RECORD, CASE No. 13,991.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 320.

SAMUEL J. RITCHIE, PLAINTIFF IN ERROR,

vs.

JAMES B. McMULLEN AND GEORGE W. McMULLEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 Be it remembered that heretofore, to wit, on the 21st day of September, A. D. 1888, a petition was filed in the clerk's office of the circuit court of the United States for the northern district of Ohio; which petition is in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. MCMULLEN & GEORGE W. MCMULLEN, Plaintiffs, vs. SAMUEL J. RITCHIE, Defendant. } Civil Action for Money Only.

Now come the above-named plaintiffs, James B. McMullen and George W. McMullen, plaintiffs, and complain of Samuel J. Ritchie, defendant, and say that said plaintiffs are citizens and residents of the State of Illinois, and said defendant is a citizen, resident, and inhabitant of Ohio and the eastern division of the northern district of Ohio.

Said plaintiffs further say that on the 26th day of February, A. D. 1888, in a cause then and theretofore pending in the high court of justice, Queen's bench division, for the province of Ontario, in the Dominion of Canada, wherein said James B. McMullen and George W. McMullen were plaintiffs and Samuel J. Ritchie was defendant, by the consideration of said court said plaintiffs recovered a judg-

2 ment against said defendant for the sum of two hundred and thirty-eight thousand dollars and costs, and that said judgment is still in full force, unreversed and unsatisfied in whole or in part.

Wherefore said plaintiffs pray for judgment against said defendant in the sum of 238,000.00, with interest from February 26th, 1888.

By WILLIAMSON, BEACH & CUSHING,
Plaintiffs' Attorneys.

UNITED STATES OF AMERICA, *Northern District of Ohio, Eastern Division.* }

STATE OF OHIO, *Cuyahoga County,* } ss:

Sam'l E. Williamson, being duly sworn, says that he is one of the attorneys of the plaintiffs in this action; that said plaintiffs are non-residents of the State of Ohio and absent therefrom, and that he believes the statements contained in the foregoing petition to be true.

SAM'L E. WILLIAMSON.

Subscribed by said Williamson in my presence and sworn to by him before me this 21st day of September, 1888.

O. C. BEATTY,
U. S. Comm'r, N. D. O.

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. MCMULLEN & GEORGE W. MCMULLEN, Plaintiffs, *vs.* SAMUEL J. RITCHIE, Defendant. } Precipe.

Civil action for money only.

Issue summons for defendant, Samuel J. Ritchie. Amount claimed, $238,000.00.

WILLIAMSON, BEACH & CUSHING,
Plaintiffs' Attorneys.

To the clerk of said court.

3 Indorsed: Petition for money only. Filed Sep. 21, 1888. A. J. Ricks, clerk.

And afterwards, to wit, on the 21st day of September, A. D. 1888, a summons was issued in said cause; which summons is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *Northern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the northern district of Ohio, Greeting:

You are hereby commanded to notify Samuel J. Ritchie that he has been sued by James B. McMullen and George W. McMullen in the circuit court of the United States within and for said district, and that unless he answers by the 20th day of October, A. D. 1888, the petition of the said plaintiffs against him filed in the clerk's office of said court, at Cleveland, in said district, such petition will be taken as true and judgment will be rendered accordingly.

You will make due return of this summons on the 1st day of Oct., A. D. 1888.

[SEAL.] Witness the Honorable Samuel F. Miller, senior associate justice of the United States, this 21st day of September, A. D. 1888, and in the 113th year of the Independence of the United States of America.

A. J. RICKS, *Clerk,*
By O. C. BEATTY,
Deputy Clerk.

4 Indorsed: Summons. Amount claimed, $238,000.00. Returnable Oct. 1, 1888. Rule for answer, Oct. 20, 1888. Returned and filed Sept. 29, 1888. A. J. Ricks, clerk. Samuel E. Williamson acknowledged himself security for all costs for which the plaintiff- may be liable in this suit.

The marshal's return on said summons is in the words and figures following, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the 26th day of September, 1888, at Tallmadge, Summit county, Ohio, I made due service of this writ by leaving a true and duly certified copy thereof, with the indorsements thereon, at the usual place of abode of the within-named Samuel J. Ritchie, he being absent from home and could not be found.

B. F. WADE,
U. S. Marshal,
By J. S. EBERMAN, *Deputy.*

And afterwards, to wit, on Saturday, December 1st, 1888, the following order was entered in said cause, viz:

In this cause the time to answer is extended until December 22nd.

And afterwards, to wit, on December 17th, 1888, the following answer was filed in said cause, viz:

5 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. McMULLEN *et al.*, Plaintiffs,
vs.
SAMUEL J. RITCHIE, Defendant.
} Answer.

1st defense. The defendant for his first defense herein says that he denies each and every averment in the petition contained, except such as are in this defense admitted to be true. He admits that he is a citizen of Ohio as stated.

2nd defense. Denying as in his first defense, he says for his second defense herein that the facts concerning said alleged judgment are as follows: That on the 13th day of January, 1886, the plaintiffs and defendant each were the owners of a large number of the bonds of the Central Ontario Railway Company, a corporation duly organized under the laws of the Province of Ontario, Canada, and were desirous of selling the same.

That on said day the defendant entered into an agreement in writing with plaintiffs, in form, for the purchase of their said bonds, 210 in number, of the par value of $1,000 each, and coupons of the same for the sum of $71,250.00, at the price of $210,000, and $40,000 of the stock of the Canadian Copper Company, a corporation organized under the laws of Ohio.

He further says that on the 24th day of October, 1887,
6 without a tender of said bonds to him or a demand for performance of said agreement by him ever having been made, an action was commenced by said plaintiffs upon said agreement against him, he then and ever since being a resident and citizen of Ohio and owing no allegiance to said Province or the Dominion of Canada, in the high court of justice, Queen's bench division, for the

Province of Ontario, in the Dominion of Canada, praying for a specific performance of said agreement or in lieu thereof for damages for defendant's alleged breach thereof, which action the defendant answered by denying that he was then liable to pay for said bonds and alleging that said agreement, by the mistake of the scrivener preparing the same and the parties, failed to set forth the true agreement of said parties, which was that said defendant should not be required to pay said plaintiffs for said bonds until the same and those owned by defendant had been sold by him, which circumstance had not then and has not since occurred.

He further says that on the 29th day of February, 1888, in the absence of this defendant and his counsel, one of the judges of said court, without evidence or a trial before him, or a submission of said cause to a jury, or the production or tender or filing of said bonds in said agreement mentioned in said court, or without an order requiring the delivery of said bonds to defendant upon payment of said judgment, directed that said plaintiffs recover of the defendant the sum named in the petition herein.

He further says that said bonds have never been filed in
7 said court and that the same were not at the time of said alleged judgment and are not now in the possession of said plaintiffs, but the same have been negotiated by plaintiffs for loans of money for their sole benefits.

3rd defense. Defendant, for a third defense herein and by way of counter-claim, says that on or about the 1st day of July, 1886, the plaintiffs converted to their own use the bonds and coupons mentioned in said agreement, and that the same were at the time of said conversion of the value of $285,000.00, which sum he asks may be credited upon any claim that may be found herein to exist in favor of said plaintiffs.

And now, having fully answered, he asks to be dismissed with his costs.

By BURKE AND INGERSOLL,
Attorneys for Defendant.

STATE OF OHIO,
Cuyahoga County, Northern District of Ohio, } ss:

S. J. Ritchie, the above-named defendant, being duly sworn, says that he believes all the facts stated in the foregoing answer to be true.

S. J. RITCHIE.

Subscribed and sworn to before me by said S. J. Ritchie this 17th day of December, 1888.

[SEAL.] ALBERT STRAUS,
Notary Public.

Indorsed: Filed Dec. 17th, 1888. A. J. Ricks, clerk.

8 And afterwards, to wit, on the 5th day of February, 1889, the following demurrer was filed in said cause, viz:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. McMULLEN *et al.*, Plaintiffs,
vs.
SAMUEL J. RITCHIE, Defendant. } Demurrer.

Now come the plaintiffs in the above-entitled cause and demur to the second alleged defense in the answer of the defendant, because the same does not state facts sufficient to constitute a defense.

Said plaintiffs also demur to the alleged third defense, because the same does not state facts sufficient to constitute a defense.

By WILLIAMSON, BEACH & CUSHING,
Plaintiffs' Attorneys.

Indorsed: Demurrer to answer. Filed Feb. 5, 1889.

And afterwards, to wit, on the 14th day of August, A. D. 1889, the following order was made in said cause, viz:

In this cause leave is given plaintiffs to file amended petition instanter.

And afterwards, to wit, on the 14th day of August, A. D. 1889, the following amended petition was filed in said cause, viz:

9 In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. McMULLEN and GEORGE W. McMULLEN, Plaintiffs,
vs.
SAMUEL J. RITCHIE, Defendant. } Amended Petition.

Now come James B. McMullen and George W. McMullen, plaintiffs, and say that said James B. McMullen is a citizen of the State of Illinois, and that said George W. McMullen is a citizen of the Province of Ontario, in the Dominion of Canada, and that both were such citizens at the time of the commencement of this action, and that said Samuel J. Ritchie, defendant, was at the time of the commencement of this action and now is a citizen of Ohio, residing in the eastern division of the northern district thereof.

Said plaintiffs further say that being on the thirteenth day of January, 1886, the owners of two hundred and ten of the first-mortgage bonds for one thousand dollars each of the Central Ontario railway, a company duly incorporated by law, and certain coupons of the same, amounting to the sum of seventy-one thousand two hundred and fifty dollars ($71,250.00), by an agreement bearing date the said thirteenth day of January, 1886, they agreed to sell the said bonds and coupons to the defendant, and the defendant agreed

to purchase the said bonds and coupons from the plaintiffs
10 for the price or sum of two hundred and ten thousand dollars ($210,000) of the fully paid-up stock of the Canada Copper Company, a company duly incorporated under the laws of the State of Ohio. In part performance of the said agreement the defendant accepted five several bills of exchange, each for the sum of five thousand dollars ($5,000.00), drawn by the plaintiff James B. McMullen to the order of the plaintiff George W. McMullen, dated the thirteenth of January, 1886, and payable at the Bank of Montreal Picton, on the first of July, 1886, on each of which acceptances was the following indorsement: "The five bonds of the Central Ontario railway of one thousand dollars each, hereto attached, are to be delivered to Samuel J. Ritchie upon the payment of this acceptance by him," and it was thereupon agreed by and between the plaintiffs and defendant that the payment of the said acceptances by the defendant should be a payment upon the contract hereinbefore mentioned of the amount of the said acceptances, viz., twenty-five thousand dollars, and that the delivery to the defendant upon such payment of the bonds so attached to the said acceptances, viz., twenty-five in number, should be accepted as delivery of twenty-five bonds of one thousand dollars each under the terms of the said contract; that said acceptances were indorsed to one P. S. Wilson, suit taken thereon by him, and judgment recovered thereon; that before the commencement of the action hereinafter mentioned all things happened, all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiffs to the performance of the said agreement, and the plaintiffs were always ready and willing to perform the same on their part, yet the defendant neglected and refused to perform the same on his part.

11 Plaintiffs further say that on or about the eighth day of October, 1887, they commenced an action in the Queen's bench division of the high court of justice for Ontario, a duly and lawfully constituted court of record, having jurisdiction over all civil and criminal matters in and for that part of the Dominion of Canada called the Province of Ontario, against the said Samuel J. Ritchie, and caused a writ of summons to be duly and personally served upon the said defendant on or about the eighth day of November, 1887; and thereafter, to wit, on the twenty-eighth day of November, 1887, the said Samuel J. Ritchie duly entered his appearance in said action in said court.

Plaintiffs further say that said action was brought upon said agreement hereinbefore set forth, and that in their pleadings or statement of claim, duly delivered to said defendant or his duly constituted solicitors and attorneys, in accordance with the laws of said Province of Ontario, said plaintiffs claimed and prayed that the said agreement might be specifically performed or that they might have damages for the breach by the defendant of his said contract; that for this purpose all proper directions might be given and proceedings had, and that they might have such further and other relief as the nature of the case might require, and that they might be paid their costs of said suit or action.

Plaintiffs further say that on or about the twenty-eighth day of November, A. D. 1887, said defendant, in accordance with the laws of said province, delivered to said plaintiffs his answer or statement of defense, wherein said defendant denied the statements contained in the several paragraphs of said plaintiffs' statement of claim,
12 and further alleged that the plaintiffs, before the making of the agreement hereinbefore mentioned, were the holders of a large number of bonds of the Central Ontario railway, in which they were jointly interested, and were anxious to dispose of the same in order to reimburse themselves the amount of their outlay in connection with said railway; that the defendant also held a quantity of said bonds, and it was thought by all parties that a better sale could be affected by the disposition of all bonds held by the plaintiffs and defendant together than that each of the parties should sell their holdings separately, and it was agreed that the bonds held by the plaintiffs should be assigned to the defendant in order to enable him to deal with the same as the apparent owner thereof, accounting to the plaintiffs for their share of the proceeds of said sale.

That in order to carry out this understanding the agreement aforesaid was prepared and executed, and the plaintiff- claimed and submitted that if said agreement purported to be an absolute sale to him of the said bonds for a certain sum and bound him to pay to the plaintiffs the said sum therefor, that the said agreement did not truly and faithfully evidence the agreement between him and the plaintiffs in respect to said bonds, and he submitted that the said agreement should be so reformed as to do so. Said defendant further alleged in said statement of defense that it was no part of the said agreement that he should pay the plaintiff*d* any money in respect of the assignment to him of said bonds or account to the plaintiffs for any money received by him from the sale of said bonds or pay them or either of them any proceeds arising from
13 such sale until the said bonds had been actually sold and disposed of and the proceeds thereof received by defendant; that the acceptances given by the defendant and mentioned in said statement of claim were given for the accom-odation of the plaintiffs solely, and that defendant was not to be called upon to pay the same or any of them until he had been successful in disposing of the said bonds and had received the proceeds of said sale, and that defendant had not then sold any of said bonds, although he had used his best endeavors to do so, and defendant claimed and submitted that said action should be dismissed with costs.

Said plaintiffs further say that issue was joined upon said defendant's statement of defense on the 18th of December, 1887, and thereafter, to wit, on the 29th day of February, 1888, said action came on for trial in said court, and it was thereupon, on the same, day ordered and adjudged that said plaintiffs recover of said defendant the sum of two hundred and thirty-eight thousand dollars ($238,000.00) and costs, to be taxed; and said plaintiffs did on the day last aforesaid, by the consideration of said court, recover of said

defendant the said sum of $238,000.00, and said judgment is still in force, unreversed and unsatisfied in whole or in part.

Plaintiffs say that by reason of the premises that defendant became indebted and is indebted to plaintiffs in the sum of two hundred and thirty-eight thousand dollars, with interest from February 29th, 1888, and, although payment has been demanded of said sum, neither the same or any part thereof has been paid.

Wherefore plaintiffs pray for judgment against said defendant for said sum of two hundred and thirty-eight thousand dollars,
14 with interest as aforesaid.

By WILLIAMSON, BEACH & CUSHING,
Plaintiffs' Attorneys.

NORTHERN DISTRICT OF OHIO, } ss:
Cuyahoga County,

Sam'l E. Williamson, being first duly sworn, says that he is the attorney of the plaintiffs, both of whom are non-residents of the State of Ohio, and that he believes the statements contained in the foregoing amended petition to be true.

SAM'L E. WILLIAMSON.

Subscribed by the said Williamson and sworn to by him before me this 7th day of August, 1889.

[NOTARIAL SEAL.] WM. B. BOLTON.

Indorsed: Amended petition. Filed Aug. 14th, 1889. M. W. Sanders, clerk.

And afterwards, to wit, on Monday, November 11th, 1889, the following order was entered in said cause, viz:

By consent of parties the answer day herein is extended until November 23rd.

And afterwards, to wit, on Saturday, November 23rd, 1889, the following order was entered in said cause, viz:

By consent of counsel time for answer herein is extended until Nov. 30th.

And afterwards, to wit, on Monday, December 2nd, 1889, the following order was entered in said cause, viz:

By consent of parties the answer day herein is extended until Dec. 9th, 1889.

15 And afterwards, to wit, on the 31st day of December, 1889, the following answer was filed in said cause, viz:

In the Circuit Court of the United States for the Northern District of Ohio, Eastern Division.

JAMES B. MCMULLEN and GEORGE W. MCMULLEN, Plaintiffs,
vs.
SAMUEL J. RITCHIE, Defendant. } Answer.

The defendant, Samuel J. Ritchie, now comes and for answer to the amended petition of the above-named plaintiffs says that he ad-

mits the citizenship and residence of the parties as stated in the petition. He admits that on the 13th day of January, 1886, or thereabouts, he entered into a contract in writing with the said plaintiffs, a copy of which, marked "Exhibit A," is hereto attached and made a part of this answer, and he denies that he entered into any other contract in writing with them upon any subject or touching any matter in contention in this action.

He admits that an action was commenced against him in the Province of Ontario, Canada, for the general purpose stated in the petition, and that service of a summons was in form made upon him in Summit county, Ohio, and that certain attorneys entered or undertook to enter the appearance of this defendant in said action.

He admits that a formal but an irregular and void judgement was entered up against him in said court on or about the 29 day of Feb., 1888, which judgement was entered without his knowl-
16 edge and in his absence and without any hearing whatever.

And this defendant denies each and every other fact, statement, and allegation in said petition.

And for a further defence this defendant alleges that the said contract entered into between the parties was entered into for the purposes stated in his answer in said original action in the Province of Ontario and for no other purpose; that the contract was altogether an accommodation contract made, between the parties with the full understanding and agreement that it was never to be performed between them; that it was made for the accommodation and convenience of the plaintiffs to enable them to make use of the bonds described in the petition and to aid them in the raising of money thereon.

And this defendant further alleges that the said plaintiffs did not at the time stated in the petition nor at any other time ever undertake to or in fact perform said contract upon their part or any part thereof. They never at any time demanded performance upon the part of this defendant of said contract, unless the bringing of said action was a demand of such performance. They never at any time tendered the bonds or coupons in the contract and in the petition mentioned to this defendant, and they never delivered any of the said bonds to this defendant, nor did they ever make delivery nor attempt to make delivery of said bonds in accordance with the terms of said written contract, the said plaintiffs well knowing at all times
that the real purpose of said contract was, and that the same
17 was not to be performed upon the part either of the plaintiffs or of this defendant.

This defendant says that he was not present at the time that said pretended judgement was rendered, but he states the fact to be that there was no facts existing or presented to the court which justified such judgement; that no bonds nor coupons were brought into court for delivery to this defendant, nor are any bonds or coupons upon deposit in the office of the clerk of said court or in any other depositary, to be delivered to the defendant upon the performance of said contract upon his part, nor is it in the power of the said plaintiffs or either of them to make such delivery.

That if the defendant were compelled to pay such judgement he would be compelled to pay the same without any consideration whatever, and without any performance on the part of said plaintiffs of their contract or any part thereof.

This defendant further charges that by the wrongful act of the plaintiffs he was compelled to and did take up and pay three of said drafts of five thousand dollars each, the same having by said plaintiff- been delivered to *bona fide* holders thereof.

That he never received but ten of the bonds specified therein and accompanying said drafts, the other five never having been delivered to him, nor have the plaintiffs ever offered to make such delivery or is it in their power to make such delivery.

18 And this defendant alleges that the conditions of said contract upon its face were dependent; that the performance upon his part depended upon the performance upon the part of the plaintiffs of their part of said contract, and that they never have performed nor undertaken to perform nor is it in their power to perform said contract or any part thereof.

He denies that any hearing occurred before said court.

He denies that said bonds or coupons were present in court or that the plaintiffs made any showing of their ability to perform said contract by bringing said bonds and coupons in court ready to be delivered to the defendant or otherwise.

He denies that there was any showing made by the plaintiffs of their readiness or ability to perform said contract, but says that said judgement was irregular and without evidence, without performance upon the part of the plaintiffs, entered up against him in his absence and without his knowledge and without any jurisdiction or authority upon the part of the court to enter such a judgement upon the facts and upon the pleadings in said action.

Wherefore this defendant prays judgement against the said plaintiffs for the sum of five thousand dollars, the amount of one of said acceptances aforesaid, which he has paid, together with interest thereon from July 1st, 1886, the date of payment; that the petition and action of the plaintiffs may be dismissed, and that such other and further judgement may be rendered as justice and equity requires.

By OVIAT & ALLEN AND
BURKE & INGERSOLL,
At'ys for Def'ts.

19 THE STATE OF OHIO, }
Cuyahoga County, Northern District of Ohio, } *ss:*

Samuel J. Ritchie, the above-named defendant, being duly sworn, says that he believes all the facts stated in the foregoing answer are true.

SAMUEL J. RITCHIE.

Signed in my presence and sworn to before me by said Samuel J. Ritchie this 31st day of Dec., 1889.

ALBERT STRAUS,
Notary Public.

[SEAL.]

Memorandum of agreement made and entered into this 13th day of January, A. D. 1886, between James B. McMullen and George W. McMullen both of the town of Picton, in the county of Prince Edward gentlemen, of the first part and Samuel J. Ritchie, of the city of Akron, in the State of Ohio, one of the United States of America, railway president, of the second part witnesseth:

First, that the parties of the first part agree to sell to the
20 parties of the second part two hundred and ten of the first-mortgage bonds of the Central Ontario railway with coupons thereon maturing 1st of April 1885, 1st Oct. 1885, and 1st of April 1886, and coupons of the same company amounting to $71,250, maturing prior to Jan. 14th. 1885 and which were stipulated to be delivered to the parties of the first part by a certain contract made in Jan. 1885, between the parties hereto for the sum of two hundred, ten thousand dollars of lawful money of Canada and forty thousand dollars of the full- paid stock of the Canadian Copper Company organized in the State of Ohio, Jan., 6th. 1886, which money and stock are to constitute a full consideration for the above bonds and coupons.

The party of the second part agrees to purchase the above-described bonds and coupons and pay for the same the sum of two hundred and ten thousand dollars of lawful money of Canada and also forty thousand dollars of the full- paid stock of the Canadian Copper Company above described such payments to be made on or before the 1st. day of July, 1886.

It is hereby agreed between the parties hereto that the delivery of the said bonds and coupons by the parties of the first part, and the payment of the above sum of two hundred and ten thousand dollars and the delivery of said Copper stock by the party of the second part, shall be made to the Bank of Montreal, at their agency, at Picton, Ontario, at the date aforesaid; and such delivery and payment shall — a completion of the terms of this contract by the parties hereto.

It is mutually agreed by the parties hereto, that the coupons actually held by the parties of the first part to the amount
21 of seventy-one thousand, two hundred and fifty dollars and which matured prior to Jan. 1885, are recognized as a delivery under the contract made between them in the said month of Jan. 1886; and the parties of the first part agree to deliver without charge to the railway company, or the party of the second part, any coupon held by them maturing prior to Jan. 1885, in excess of seventy-one thousand, two hundred and fifty dollars; and they further stipulate that they have not sold nor disposed of any such coupons except as attached to bonds disposed of by them to the extent of twenty-one bonds.

Each of the parties hereto acknowledges the receipt of valuable consideration for the execution of this agreement, and severally bind themselves and their heirs, executors, administrators, and assigns to the faithful fulfillment of the obligations herein undertaken by them respectively.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(S'd) J. B. McMULLEN. [L. S.]
(S'd) G. W. McMULLEN. [L. S.]
(S'd) S. J. RITCHIE. [L. S.]

Signed, sealed, and delivered before me at Picton, Ontario.
(S'd) J. H. ALLEN.

Endorsed: Received of S. J. Ritchie his acceptances, five in number, each of the sum of five thousand dollars, drawn by J. B. McMullen to the order of G. W. McMullen, dated 13th Jan., 1885, and payable at the Bank of Montreal, Picton, on July 1st, 1886, on each of which is the following endorsements:

22 The five bonds of the Central Ontario railway of $1,000.00 each, hereto attached, are to be delivered to S. J. Ritchie upon the payment of this acceptance by him.

(S'd) J. B. McMULLEN.
(S'd) G. W. McMULLEN.
(S'd) J. B. McMULLEN.

It is agreed that the payment of these acceptances by S. J. Ritchie will be a payment of them face value, upon this contract, and the delivery *of* him thereupon of the attached bonds will be equivalent to the delivery under the terms of this contract of the number of bonds so attached to these acceptances.

(S'd) S. J. RITCHIE.
(S'd) J. B. McMULLEN.
(S'd) G. W. McMULLEN.

Indorsed: Answer. Filed Dec. 31st, 1889. M. W. Sanders, clerk.

23 And afterwards, to wit, on the 7th day of January, A. D. 1890, the following demurrer was filed in said cause, viz:

In the Circuit Court of the United States, Northern District of Ohio, Eastern Div'n.

JAMES B. McMULLEN *et al.*, Plaintiffs,
vs.
SAMUEL J. RITCHIE, Defendant. } Demurrer.

Now come the plaintiffs in the above-entitled cause and demur to the answer of the defendant to the amended petition because the same does not state facts sufficient to constitute a defense.

By WILLIAMSON, BEACH & CUSHING,
Plaintiffs' Att'ys.

Indorsed: Demurrer. Filed Jan. 7, 1890. M. W. Sanders, clerk.

And afterwards, to wit, on Monday, February 17th, 1890, the honorable Augustus J. Ricks, district judge, presiding, the following order was entered in said cause, viz:

This day came the parties, by their counsel, and came on for hearing plaintiffs' demurrer to the amended answer herein, and the same was argued by counsel, and due consideration having been given by the court, it is ordered that the said demurrer be sustained; to which ruling of the court defendant excepts.

Thereupon, upon motion of the plaintiffs, it is ordered that the said plaintiffs have and recover a judgment on the pleadings herein as prayed for, and thereupon it is ordered that said plaintiffs
24 have and recover from the defendant, Samuel J. Ritchie, the sum of two hundred sixty-five thousand three hundred and seventy dollars, as claimed in the petition herein, with interest from the first day of this term, and also their costs in this behalf expended, to be taxed; to which ruling of the court defendant excepts.

And afterwards, to wit, on the 27th day of February, 1890, the following writ of error was issued in said cause, viz:

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between James B. McMullen and George W. McMullen, as plaintiffs, and Samuel J. Ritchie, as defendant, a manifest error hath happened, to the great damage of the said Samuel J. Ritchie, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, Northern Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27th day of February, in the year of our Lord one thousand eight hundred and ninety.

MARTIN W. SANDERS,
Clerk of the Circuit Court of the United States,
North. Dist. Ohio.

Allowed by—
——— ———.

26 And afterwards, to wit, on the 27th day of February, A. D. 1890, the following bond was filed in said cause, viz:

Know all men by these presents that we, S. J. Ritchie, as principal, and H. P. McIntosh, as surety, are held and firmly bound unto James B. McMullen and George W. McMullen in the full and just sum of five hundred dollars, to be paid to the said James B. McMullen and George W. McMullen, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 26th day of February, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a February term, A. D. 1890, of the circuit court of the United States for the northern district of Ohio, in a suit depending in said court between James B. McMullen and George W. McMullen, as plaintiffs, and Samuel J. Ritchie, as defendant, a judgment was rendered against the said Samuel J. Ritchie, and the said Samuel J. Ritchie having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James B. McMullen and George W. McMullen, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if
27 the said Samuel J. Ritchie shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

H. P. McINTOSH. [SEAL.]
S. J. RITCHIE. [SEAL.]

Approved by—
A. J. RICKS,
U. S. Dist. Judge, N. D. O.

Indorsed: Bond. Filed Feb. 26th, 1890. M. W. Sanders, clerk.

28 The United States of America to James B. McMullen and George W. McMullen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of U. S. for the northern district of Ohio, eastern division, wherein Samuel J. Ritchie is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Augustus J. Ricks, judge of the district court of the United States for northern district of Ohio, sitting in

circuit court, this 27th day of February, in the year of our Lord one thousand eight hundred and ninety.

AUGUSTUS J. RICKS,
U. S. Dist. Judge, N. D. O.

29 NORTHERN DISTRICT OF OHIO, *ss*:

The within-named James B. McMullen and George W. McMullen, or either of them, not being found within said district, I, on the 27th day of February, 1890, at Cleveland, Ohio, delivered a true and duly certified copy of this writ to William E. Cushing, one of the firm of Williamson, Beach & Cushing, attorneys of record of the said James B. McMullen & George W. McMullen.

B. F. WADE, *U. S. Marshal*,
By J. S. EBERMAN, *Deputy*.

Service	2 00
Copy	50
Travel	50
	$3 00

30 UNITED STATES OF AMERICA, }
Northern District of Ohio. }

I, Martin W. Sanders, clerk of the circuit court of the United States for said district, do hereby certify that the above and foregoing is a true, correct, and complete transcript of the record of all the proceedings in said court in the cause wherein Samuel J. Ritchie is plaintiff and James B. McMullen and George W. McMullen are defendants, as the same appears from the files and records of said court now remaining in my custody.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Cleveland, in said district, on this 28th day of February, A. D. 1890, and of the Independence of the United States of America the 114th year.

MARTIN W. SANDERS, *Clerk*.

Endorsed on cover: Case No. 13,991. N. Ohio C. C. U. S. No. 320. Samuel J. Ritchie, plaintiff in error, *vs.* James B. McMullen and George W. McMullen. Filed March 3, 1890.

81

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

McMULLEN *et al.* v. RITCHIE.

(*Circuit Court N. D. Ohio, E. D.* February 17, 1890.)

FOREIGN JUDGMENTS—CONCLUSIVENESS.

The judgment of a court of competent jurisdiction of a foreign country, in a suit between the same parties and in which defendant appeared by counsel, will be *held* conclusive, in the absence of fraud; and it is immaterial that the judgment was rendered in defendant's absence, and without his knowledge, he not denying the authority of the attorney to enter his appearance.

At law. On demurrer.

S. E. Williamson, for plaintiffs.

Stevenson Burke and *J. E. Ingersoll*, for defendant.

Before JACKSON and RICKS, J. J.

RICKS, J. The plaintiffs instituted this suit to recover from the defendant the sum of $238,000, with interest, which he alleges the defendant is legally obligated to pay because of a judgment for that sum rendered in plaintiff's favor in the queen's bench division of the high court of justice for Ontario. The amended petition sets forth the provisions of the original contract upon which the judgment was based, and avers that said action was brought upon said agreement; that plaintiffs prayed that said agreement might be specifically performed, or that they might have damages for the breach thereof; that a proper answer was filed by defendant setting forth fully his defense to said suit; and that upon a trial judgment was rendered in favor of plaintiffs for said sum. The defendant in his answer avers that the contract sued upon in Canada was an accommodation contract, with the full understanding that the same was never to be performed, and that, if the defendant was

compelled to pay said judgment, he would be compelled to pay the same without any consideration, and seeks to have the issues set forth in his answer in the Canada case presented and tried in this suit. The answer does not deny the authority of the attorney to enter his appearance in the Canada suit, nor does he deny that he filed an answer in said case setting up the same defense now sought to be made in this court. Having by his appearance and answer submitted to the jurisdiction of the Canada court, and having presented matters of defense which that court must have passed upon in rendering the judgment set forth in the amended petition, the question now to be determined is, can he be permitted in this court to retry the same matters of defense presented in the Canada suit? It is not material that the judgment in said case was rendered in defendant's absence, and without his knowledge, as he avers in his answer here, because that court had full jurisdiction of the subject-matter, and of the defendant, through his entry of appearance by his counsel. Every intendment, therefore, is in favor of the regularity of its proceedings and of the validity of its judgment, as it is not now attempted to impeach it for fraud. The case, therefore, fairly presents for consideration the force and effect to be given by this court to a judgment rendered by a foreign court in a suit between the same parties; the jurisdiction of the subject-matter and of the person having been properly acquired, and the proceedings being unassailed for fraud.

Counsel for defendant have cited the cases of *Burnham* v. *Webster*, 1 Woodb. & M., 172; *Buttrick* v. *Allen*, 8 Mass., 273; *Bank* v. *Harding*, 67 E. C. L., 686; *Lyman* v. *Brown*, 2 Curt., 559; *Wood* v. *Gamble*, 11 Cush., 8; and *Schuler* v. *Israel*, 120 U. S., 506, 7 Sup. Ct. Rep., 648. In the first case cited the doctrine is recognized that the foreign judgment is only *prima facie* evidence as between the parties to it; and Mr. Justice WOODBURY, in that

case, granted a new trial because the trial judge had refused to allow testimony to go to the jury impeaching the judgment for mistake and irregularity, although the foreign court in which it was rendered had full jurisdiction of the subject-matter and parties. The learned judge in that case said:

"I would allow the opposing party, where a foreign judgment is sued, pleaded, or offered in evidence, to rebut its *prima facie* force and obligation by showing that the merits of the claim, now in controversy, were not, in truth, at all there considered and adjudged; and I would do that, whether it occurred by accident or mistake, or any agreement of the parties, or any other excusable cause, as well as when it arose from the want of personal service."

Other courts, in cases arising about that same period—nearly half a century ago—held the same doctrine. But later decisions, in cases more carefully considered and better reasoned, give greater force and dignity to the records of foreign courts, not only as a matter of comity, but for the better reason that when parties have once had their day in a court of competent jurisdiction, after due service of process, or after entry of appearance, and have had a full and impartial hearing upon the merits of their case as made in the pleadings, they should be bound by the judgment of that tribunal, unless they can show its proceedings were tainted with fraud. Counsel for plaintiff has cited the following authorities, which fully sustain the doctrine just stated: *Bank* v. *Nias*, 71 E. C. L., 717; *Godard* v. *Gray*, L. R. 6 Q. B., 139; *Scott* v. *Pilkington*, 2 Best & S., 11; *Lazier* v. *Westcott*, 26 N. Y., 146; *Baker* v. *Palmer*, 83 Ill., 568.

In the case of *Godard* v. *Gray*, decided in 1870, in the court of queen's bench, the prior decisions in England are reviewed, and the learned judge concluded that the law was then well settled in the English courts that the

judgment of a foreign tribunal, having jurisdiction over the party and the cause, can not be impeached on the ground that it was erroneous on the merits, or that to an action on such judgment the judgment debtor could not defend that the tribunal mistook either the law or the facts. The court of appeals of the State of New York, in the case above noted, after a thorough review of the decisions of the courts in England and America, approves the reasoning of Chancellor KENT and Justice STORY, and says that the same principles and decisions made as to judgments from the courts of other States of the Union should be applied to foreign judgments. The court, after quoting freely from Justice STORY in favor of the absolute conclusiveness of the foreign judgments, except in cases in which the court which pronounced the judgment had not due jurisdiction of the case and of the defendant, or the proceeding was in fraud or founded in palpable mistake or irregularity, or bad by the law of *rei judicatæ*, approves his views as eminently correct, and most in harmony with sound principles and the best-considered cases. The court in the same opinion quotes from Justice STORY, and says:

"Holding that the judgment was only to be regarded as *prima facie* evidence for the plaintiff, he correctly says, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial."

If the action of the court of original jurisdiction, having the parties and the subject-matter properly before it, is to be reviewed, and its judgment to be treated as only *prima facie* evidence for the judgment creditor, in what class of cases is the court of second or third resort to go behind the original judgment and retry the case on its merits? Is it to do so where, in its opinion, the court of original jurisdiction was not one of equal learning or of

equal rank, or where the judgment debtor, through want of diligence, or because of the lack of zeal or ability of his counsel did not secure as full and intelligent an examination of his defense as he should have had? If the original judgment is to be reviewed for any reasons other than for fraud or want of jurisdiction, where is the boundary line of the reviewing court to be fixed? Mr. Justice WOODBURY, in his opinion in the case cited by defendant's counsel, opens the door as wide as possible, and authorizes the court to explore the whole field covered by the issues made in the original suit, and to review its proceedings upon all or any one of the issues there made and not fully considered, whether by accident or mistake, or for any excusable cause. I can not approve such doctrine. It would destroy the force and effect of judicial proceedings, and make the judgments of a foreign tribunal, no matter how high its rank or how binding its decisions within its own jurisdiction, of little greater effect than the original contract or promise sued upon. I think the doctrine, as maintained by the later English and American cases to which reference has been made, has advanced the courts one stage in the progress of simplifying the administration of justice. It is important that there should be a limitation to litigation, and that parties, as to matters upon which they had a full hearing in the court of orignal and competent jurisdiction should not be permitted to open and retry issues once fairly determined, whenever and wherever they had an opportunity to do so, by defending against judgments rendered in a foreign country to which they were properly made parties. I am, therefore, of the opinion that the judgment set out in the amended petition in this case has the same force and effect as a judgment of a court of competent jurisdiction in one of the States of this Union, and is conclusive against the defendant of the matters therein adjudged. The demurrer to the answer will, therefore, be allowed.

JACKSON, J., concurs.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

SAMUEL J. RITCHIE, Plaintiff in Error,
vs.
JAMES B. McMULLEN AND GEORGE W. McMULLEN, Defendants in Error.

Term No. 81.

THE FACTS.

1888, September 21, suit commenced by defendants in error, James B. McMullen and George W. McMullen, against Samuel J. Ritchie, plaintiff in error herein, in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, the petition setting forth simply the allegation that, on the 26th of February, 1888, in a case in the High Court of Justice, Queen's Bench Division, for the Province of Ontario, Dominion of Canada, the said James B. and George W. McMullen, by consideration of the court, recovered a judgment against the said Samuel J. Ritchie for $238,000, and costs, and that said judgment is still in full force, unreversed and unsatisfied, in whole or in part (R., p. 1).

1888, September 26, return made by marshal that he had served said Samuel J. Ritchie by leaving summons at Ritchie's usual place of abode (R., p. 3).

1888, December 1, the court made an order extending the time for answer until the 22d of December (R., p. 3).

1888, December 17, Ritchie filed answer to the original petition, stating, in substance, as follows:

(1) That he denies all the averments of the petition except those admitted in the answer, and admits his citizenship of Ohio.

(2) For a second answer he sets up the following facts: That, on January 13, 1886, plaintiffs and defendant were each the owners of a large number of bonds of the Central Ontario Railway Company, a corporation duly organized under the laws of the Province of Ontario, and were desirous of selling the same.

That on said day defendant entered into an agreement in writing with said plaintiffs, in form, for the purchase of their said bonds, 210 in number, of the par value of $1,000 each, and coupons of the same amounting to $71,250, at the price of $210,000, and $40,000 of the stock of the Canadian Copper Company, a corporation organized under the laws of Ohio.

He further says that on October 24, 1887, without a tender of said bonds to him, or a demand for the performance of said agreement by him ever having been made, suit was commenced by plaintiffs upon said agreement against him, the said Ritchie, who was then, and ever since has been, a resident and citizen of Ohio, owing no allegiance to said Province, or the Dominion of Canada, in the High Court of Justice, Queen's Bench Division, for the Province of Ontario, praying for specific performance of said agreement, or in lieu thereof for damages for defendant's alleged breach thereof, which action defendant Ritchie answered by denying that he was then liable to pay for said bonds, and alleged that said agreement, by mistake of the scrivener preparing the same and the parties, failed to set forth the true agreement of said parties, which was that defendant should not be required to pay for said bonds until the same, and those owned by defendant, had been sold by

him, and which circumstance had not then, and has not since, occurred.

That, on February 29, 1888, in the absence of defendant and his counsel, one of the judges of said court, *without evidence or a trial before him*, or a submission of said cause to a jury, or the production, tender, or filing of said bonds, or without an order requiring the delivery of said bonds to defendant upon payment of said judgment, directed that plaintiffs recover of the defendant the sum mentioned in the petition.

The answer further says that said bonds have never been filed in court, and were not at the time of said alleged judgment, and are not now, in the possession of plaintiffs, but have been negotiated by them for loans of money for their sole benefit.

For a third defense, and by way of counter-claim, the anwer alleges that, on or about July 1, 1886, plaintiffs converted to their own use the bonds and coupons mentioned in said agreement, and that the same were, at the time of said conversion, of the value of $285,000, which sum defendant asks may be credited upon any claim that may be found to exist in favor of said plaintiffs, and asks to be dismissed with his costs (R., pp. 3 and 4).

1889, February 5, plaintiffs demurred to second defense in defendants' answer on the ground that the facts stated are not sufficient to constitute a defense, and to the third because the same does not state facts sufficient to constitute a defense. The court, so far as appears, did not pass on this demurrer (R., p. 5).

1889, August 14, plaintiffs filed amended petition, which extends from page 5 to page 8 of the Record. This amended petition states, in substance, that said James B. McMullen is a resident of Illinois, and that George W. McMullen is a citizen of the Province of Ontario, and that they were such citizens at the commencement of this action; that defendant, Ritchie, is a citizen

of Ohio; that, on January 13, 1886, plaintiffs were the owners of 210 first mortgage bonds, of $1,000 each, of the Central Ontario Railway Company, a company duly incorporated, and of certain coupons of same, amounting to $71,250; and by agreement of date January 13, 1886, agreed to sell said bonds and coupons to Ritchie, and Ritchie agreed to purchase said bonds and coupons from plaintiffs for the price of $210,000 of the fully paid-up stock of the Canadian Copper Company, incorporated under the laws of Ohio; that in part performance of said agreement defendant accepted five bills of exchange for $5,000 each, drawn by said James B. McMullen to the order of George W. McMullen, dated January 13, 1886, payable at the Bank of Montreal, Picton, on July 1, 1886, on each of which acceptances was an endorsement to the effect that the five bonds of said Central Ontario Railway Company attached to the acceptances were to be delivered to the defendant upon his payment of the acceptances, and it was agreed between the plaintiffs and defendant that such payment of the acceptances by the defendant should be payment upon the contract aforesaid of the amount of the acceptances, to wit, $25,000; and that the delivery to the defendant upon such payment of the bonds so attached, to wit, 25,000 in number, should be accepted as a delivery of 25 bonds of $1,000 each under the terms of the said contract, and that, before the commencement of the action in Canada, named below, the plaintiffs had performed their part of the contract, and that all the things had transpired which entitled plaintiffs to recover.

The petition then proceeds to set forth that, on October 8, 1887, they commenced their action in the Queen's Bench Division of the High Court of Justice of Ontario, making the usual averments as to the jurisdiction of the court; that the said defendant, Ritchie, delivered, according to the laws of Canada, his answer or statement of de-

fense. It then sets forth the defense, which Ritchie put in, *in extenso;* it being, in substance, the same as that set forth in the above answer of Ritchie to the original petition, and then concludes by saying that on February 29, 1888, plaintiffs obtained a judgment in said court for $238,000, and that, *by reason of the premises*, the defendant became indebted, and is indebted, to the plaintiffs in the sum of $238,000, with interest from Febuary 29, 1888 (R., pp. 5, 6, 7, and 8).

1889, December 31, Ritchie filed his answer to this amended declaration, which extends from page 8 of the Record to page 12, inclusive. As this answer was demurred to and demurrer sustained, and judgment rendered below in the case after demurrer sustained, it is, we think, best to refer the court to the answer itself instead of relying upon a synopsis thereof. Still, as a matter of convenience, we here insert what is the substance of the answer, as follows:

(1) That judgment was rendered in defendant's absence *without any hearing whatever.*

(2) That it was agreed that the contract sued on should never be performed, and was made for the accommodation of plaintiffs.

(3) That plaintiffs never delivered, or tendered, or deposited the bonds, for the price of which they sued.

(4) That plaintiffs never demanded performance of Ritchie.

(5) That plaintiffs never delivered, nor attempted to deliver, any of the bonds to Ritchie, nor tendered them, nor brought them into court.

(6) That defendant was not in court when the judgment was rendered, and no facts existed or were presented to the court which justified the judgment.

(7) That plaintiffs never made any tender, deposit, or production of any of the bonds or coupons, nor was it in their power to do so.

(8) That if the defendants were compelled to pay the judgment, it would be *without any consideration*, and without any performance of plaintiffs' part of the contract.

(9) That the conditions of the contract sued on were "dependent" conditions, and that plaintiffs never performed their part.

(10) *Defendant denies that any hearing occurred before said court.*

(11) Alleges that plaintiffs never made any showing of their ability to perform said contract by bringing the bonds and coupons into court.

(12) Denies that there was any showing made by the plaintiffs of their readiness or their ability to perform their contract, and avers that said judgment was irregular, *was rendered without evidence, without performance upon the part of plaintiffs, and was entered up against defendant in his absence, without his knowledge, and without jurisdiction or authority on the part of the court to enter the judgment.*

(13) The answer of defendant concludes by setting out at length a copy of the contract sued on.

1890, January 7, plaintiffs filed a demurrer to the answer to the amended petition on the ground that the answer did not state facts sufficient to constitute a defense (R., p. 12).

1890, February 17, the demurrer to the amended answer was sustained by the court, and judgment thereupon rendered against Ritchie for $265,370, as claimed in the petition, with interest from the first of the term, and costs (R., pp. 12, 13).

From this judgment the writ of error to this court was, by Samuel J. Ritchie, duly taken.

Assignment of Error.

1. The court below erred in sustaining the demurrer to the plaintiff in error, Ritchie's, answer to the amended petition.

2. The court below erred in rendering a judgment against plaintiff in error on the alleged cause of action set forth in the petition.

3. The court erred in holding that the judgment of the said High Court of Justice, Queen's Bench Division, of the Province of Ontario, which is set forth in the amended declaration, constituted a conclusive cause of action against plaintiff in error, which could not be defended against upon the merits of the original cause of action prosecuted in said Canadian court.

4. The court below erred in holding that the averment of the said answer, alleging that said judgment was rendered by said Canadian court without his (the said Ritchie's) knowledge, and in his absence, *and without any hearing whatever*, did not show a defense to the action based on said Canadian judgment.

5. The court erred in holding that the averment of the said answer, which says *that no hearing before said Canadian court was had prior to the rendition of said judgment*, showed no defense to the action based on said Canadian judgment.

6. The court below erred in holding that said Canadian judgment was conclusive against the plaintiff in error, Ritchie, although it appeared by the averments of the answer, in substance, that the defendants in error never attempted to perform, nor were able to perform, nor offered to perform, their part of the contract, or any part thereof, on which they sued in said Canadian court; that they never delivered to the said Ritchie, nor brought into court, nor in any way or place deposited the bonds

and coupons which formed the consideration for the alleged indebtedness for which said judgment was rendered; that they, the said defendants in error, procured the said judgment to be entered up against said plaintiff in error by one of the judges of said court, *without any hearing whatever* by the court, and in the absence of the defendant, Ritchie, and of his counsel, *and without evidence or trial before him*, or the submission of said cause to a jury, or the production, tender, or filing of said bonds in said agreement mentioned in said court, or without an order requiring the delivery of said bonds to plaintiff in error upon the payment of said judgment; and that said judgment against the said Ritchie was, by the fraudulent conduct of said defendants in error, procured to be rendered against said Ritchie for $238,000, with interest and costs, through and by means of the fraudulent imposition upon said court and judge, which is, as aforesaid, fully set forth in said answers.

7. The court below erred in according to the said judgment rendered by said court of Ontario absolute conclusiveness as against the said Ritchie, and which conclusiveness is the law then and now in force in said Province of Ontario, *denied* to judgments rendered in the courts of the United States, and of these States, when sued on in the courts of said Province; and which rule of conclusiveness was and is, by reason of said *denial* and of the other principles of law applicable to said subject-matter, not applicable to the said action against the said Ritchie in which the said judgment was rendered, in this case, by the Circuit Court of the United States for the Northern District of Ohio.

8. And other errors appearing in the Record.

BRIEF.

Legal Positions Asserted.

There are three several and distinct conditions of law and fact coming within the possible purview of the present case, as to which, should this court find either one of them to have existed at the date of the Canadian judgment, or at the date of the judgment in the court below, then this court will reverse the judgment in the case at bar for error in sustaining the demurrer.

1. One of these conditions is that if only *prima facie* force ought to be accorded to the foreign judgment sued on, then, manifestly, Ritchie's answer was good, and there was error in sustaining the demurrer thereto.

2. If our law at the date of the judgment below accorded to said Canadian judgment a higher degree of force than mere *prima facie* force, and gave it such degree of force as our courts of equity accord to all domestic judgments, in suits brought to cancel judgments on the ground of fraud of the plaintiff in obtaining them, to wit, that they will be canceled if, in obtaining the judgment, "there had never been any real contest in the trial or hearing of the case" (98 U. S., 66), then it is equally manifest that there was error in sustaining said demurrer; for that absence of a hearing and of evidence and of all justice in the Canadian court is precisely what the said answer averred.

3. Or if at the date of the judgment below the law of the United States accorded to said Canadian judgment a higher degree of conclusiveness than mere *prima facie* force, but a less degree than our courts of equity accord to domestic judgments in actions to set them aside for fraud, and gives to them the same force as is given in the courts of England and of Canada to our judgments when sued on in Canada, and that these courts of Canada

suffer our judgments to be overthrown wherever it appears that the judgment was flagrantly unjust, or was obtained by the active fraud of the plaintiff, and this although the defendant was in court, and the fraud consisted in knowingly imposing on the court a claim which the plaintiff knew to be totally unjust and without foundation, then, and even in that case, the answer was good, because this state of fact is precisely what is set up in said answer.

For the sake of clearness we repeat more fully, and at the threshold of this discussion, our position regarding the third of these conditions, as follows (upon the assumption which we controvert that this court will accord more than *prima facie* force to a foreign judgment):

1. Any averments in the said answer, in the court below, which went to the overthrow of the judgment of the Canadian court, such, for example, as that Ritchie was not in court, or that the Canadian judgment was procured by *such* fraud of the plaintiff as would, by the law in force in Canada, destroy the judgment in an action brought on it, are competent and material averments, and are, therefore, well pleaded, and are admitted by the demurrer.

2. Since foreign judgments have in the United States no force, either by their own vigor or by reason of any existing positive law, they can be enforced in our courts only in such ways and cases and to such extents as our nation, through the action of our courts, shall accord to them in virtue of the *reciprocal* comity recognized between modern civilized States.

The obligations of this comity are *at most* "imperfect," and are, by each nation, voluntarily adopted, exercised, and modified in the interests of its own people. These imperfect obligations do not require or permit our courts to enforce the judgments of the courts of another country where that other country denies in like cases the same comity to us.

3. If by the conditions of this international law (assuming that there was any international law on the subject), which, at the date of this Canadian judgment, was in force in England and in her Province of Ontario, the courts of these countries refused to enforce any judgment rendered in a court foreign to Great Britain and her colonies which was violative of "natural justice," and which was procured by the fraud of the plaintiff imposed on the court, then this court will not extend to judgments of English or Canadian courts any greater force than they extend to our judgments under like conditions.

If it is established *as a fact* that at the date of this Canadian judgment the rule in England and Canada was that the English and Canadian courts would not enforce a judgment that had been unjustly procured, or that had been procured by concealing from the court facts that must have been known to the plaintiff, and the disclosure of which would have precluded the rendition of such judgment, then the courts of this country will, under like conditions and circumstances, refuse to enforce foreign judgments.

We shall hereinafter attempt to show that in the case of *Abouloff* v. *Oppenheimer* (10 Queen's Bench Division, 295, and other cases), it has been settled as the rule in England and Canada that in a case in its facts, such as this now at the bar of this court, the enforcement of a foreign judgment would be refused by the English courts; and we shall contend that such being the rule in the English and Canadian courts, then no rule of comity or reciprocity or international law would require or permit the courts of this country to enforce a judgment that was rendered under like facts and circumstances in England or Canada. To make our contention in this regard more explicit, we here state that the case of *Abouloff* v. *Oppenheimer* was, in its facts, in exact substance, iden-

tical with this case, in that the court refused to enforce, in England, a Russian judgment, because the court found that the plaintiff, in the Russian court, had fraudulently procured the judgment to be rendered in her favor for the value of property taken from her by the defendant, when the plaintiff knew that she was still in possession of the property.

In the case at bar the plaintiffs, in the Canadian court, procured that court, without any hearing or evidence, to render a judgment in their favor against plaintiff in error for $238,000, for, and as the value of, bonds and coupons assumed to have been gotten of them by plaintiff in error, when they knew that he had never received, or even been tendered, one farthing's worth of these bonds or coupons, and that they had, themselves, hypothecated the bonds for loans.

Hence said averments of the answer of plaintiff in error were well pleaded in our court, and these considerations show that the demurrer ought to have been overruled.

We now recur to our first proposition.

I.

In Suits on Foreign Judgments they have only Prima Facie Force.

This case presents now, for the first time in this court, the question whether a foreign judgment, when sued upon in one of the Federal courts of the United States, is to be conclusive upon the merits of the controversy out of which the judgment grew, or is to be deemed to be only *prima facie* evidence of the indebtedness.

Undoubtedly, at the time of the adoption of the Constitution, foreign judgments were not regarded by the public law as conclusive. The judgments of the State

courts, when sued on in a court of another State, were made conclusive by section 1, article 4, of the Constitution, which requires each State to give full faith and credit to the judicial proceedings of every other State, clearly implying, as the law then undoubtedly was, that but for this the courts of one State would not be bound by the judgments of the courts of another State, but might, in its own way, re-examine matters in controversy on the original merits.

This provision of our Constitution and statute, of course, has no application to judgments of the courts of a foreign nation when sued on in the courts of the United States. But its incorporation in the Constitution, limiting its operation to judgments of the State courts, in effect, excludes its operation as to foreign judgments; or is a negative declaration that, as to foreign judgments, the courts of the United States will not recognize that they have any binding effect, and that the courts of the United States will not give them the effect of being conclusive upon the merits.

All the decisions holding that the judgments of one State are conclusive when sued on in the courts of another, went upon the footing that the law was not so as to foreign judgments. See note to case of *Bank of Australasia* v. *Nias* (16 Adolphus & Ellis, 737); also *Bissell* v. *Briggs* (9 Mass., 461, 465, 466).

It can not be disputed that foreign judgments have, of their own vigor, no extra-territorial force; and it must be also admitted that they can receive extra-territorial force only in virtue of some treaty stipulation fixing definitely their significance, and providing that the judgments of the one may have, in the courts of the other country, the stipulated force; or else such extra-territorial force must be given them by the comity or reciprocity that has come to be extended to them in the courts of the respective countries.

As to whether a matter of this supreme importance can, practically, be determined by the exercise, in the courts of Christendom, of their discretion touching the character and extent of reciprocity, or comity, which the nations of Christendom owe to each other, regarding the force which these nations, respectively, will give to foreign laws and foreign judgments, we submit that, after you have passed beyond the well-defined rule which gives to such foreign judgments only *prima facie* force, the adoption of any general and definite rule is practically impossible. This is demonstrated by the present condition of this feature of the public law—such present condition being, as shown by the authorities we herein cite, only confusion, contradiction, and uncertainty, if the rule of *prima facie* force is departed from.

This impracticability of the courts, when they have departed from the principle of according *prima facie* force to foreign judgments, establishing any other definite rule on this subject, arises, amongst other things, out of the fact that the elements and intrinsic characteristics of the cases which come before the courts are infinitely various, diversified, and shifting; so that it has been shown by experience to be impracticable to *thus* fix the line of separation between the matters which the foreign judgment shall conclude, and those which it does not conclude.

Besides this, the courts themselves, in the *same* country, are constantly shifting their positions; and the courts in the different nations of the world are, in relation to the decisions of each other, incessantly varying.

The result of all this, and of other causes, is that, as we see, by the highest authorities herein cited, there is in existence, to-day, no principle or rule of public law that defines the extra-territorial force of foreign judgments, if that one is to be regarded as abandoned which made judgments in a foreign country only *prima facie* evidence.

But even if the *courts* of the countries could reach some definite rule of comity and reciprocity, we urge that it is not within the province of the courts of this nation to give conclusive force to such judgments; and that, if effect is to be given to a foreign judgment in our Federal courts, it must be done by treaty between the nations; that it is not within the province of this court or any other authority to give to a foreign judgment such force in this country as to preclude our own citizen from having his case tried on the merits. Such force can, *subject to the limitations of our Constitution*, only be given to a foreign judgment by positive law, or by treaty stipulation, having the force and effect of statutory enactment, just as the judgments of our State courts were given force in all the other States by the Constitution, and statute.

We submit that it is not within the competency of the courts to give to foreign judgments more than *prima facie* effect, for, amongst others, the reason which we state, as follows:

It is not disputed, but, on the contrary, is universally asserted, that foreign laws and foreign judgments have, of their own vigor, no extra-territorial force. These are neither laws nor judgments, of their own vigor, within the United States in any possible sense. If, therefore, they are given, within the United States, and the courts thereof, any force, *it must not be in contravention of the Constitution of the United States.*

One provision of the Constitution which must be observed in giving force to foreign judgments or laws, within our own courts, is that which is found in the seventh amendment, securing, as there provided, the right of trial by jury. Of this right, Judge Cooley says, in his work on *Constitutional Limitations* (side page 410), that "*no conditions can be imposed upon the exercise of this right that shall impair its value and usefulness.*"

Citing—

Green v. *Briggs*, 1 Curt. C. C., 311;
Lincoln v. *Smith*, 27 Vermont, 328;
Norristown Co. v. *Burket*, 26 Ind., 53;
State v. *Gurney*, 37 Maine, 156;
Copp v. *Henniker*, 55 N. H., 176.

The trial by jury here provided for is in our own courts, and not in some foreign court.

Now, upon the principle that it is not an infraction of this seventh amendment to make provision for a *first* trial in a tribunal having no jury, provided a right to resort to an appellate tribunal, where the right of jury trial is secured (*Cooley Const. Lim.*, side page 410, and cases in *Note* 5, 26 Ind., 53, and cases cited), it would be no invasion of the provisions of this seventh amendment to give to foreign judgments in our courts mere *prima facie* force, leaving the case open to a trial on the merits by a jury if the parties interested so desire. But for the courts to accord a degree of conclusiveness to one of these foreign judgments, no odds how rendered, and although no jury trial was had in the foreign country, and although the action was on a contract made by one of our own citizens within our own country, and in which he would have in our courts an unquestioned right to trial by jury, is plainly and palpably a denial to such citizen of the right to trial by jury.

A trial by jury of the questions which may be set up in defense in an action on a foreign judgment, which the court treats as *conclusive of the merits*, would be the merest mockery of that "trial" meant by the seventh amendment. The twenty-dollar clause in this seventh amendment, if nothing else, proves conclusively that the matter as to which jury trial is secured by the amendment is a trial on the merits. Therefore, such recognition of foreign judgments would be for our court to *import*,

under most vague rules of construction, or of comity, or of reciprocity, into our country, the laws and judgments of foreign countries, however repugnant to our Constitution and hostile to our policies and our interests. It would be to give conclusive force and effect to such foreign judgments, although the trial may have been by a court whose processes, proceedings, rules of evidence, and other modes of trial were not only repugnant to our laws and institutions, but violative of every principle of natural justice. Such an interpretation of the law of comity is not only a palpable violation of the seventh amendment, but is also hostile to that principle of the public law so powerfully enforced in the opinion of Lord Chancellor Brougham in the case of *Houlditch* v. *Donegall* (2 Clarke & Finelly, 476), which we cite in another connection, and which principle is expressed in the following words in section 656 of *Wharton on the Conflict of Laws:*

"We have already seen that a foreign law will not be admitted for the purpose of *overriding any rule of distinctive domestic policy. This principle is necessarily applicable to judgments, since otherwise all that would be necessary to force the repugnant law upon us would be to formulate it in the shape of a judgment. The fact of the obnoxious prerogative taking the shape of a judgment does not make it any the more authoritative.*"

In illustration of this the author cites *De Brimont* v. *Penniman* (10 Blatchford, 436), and cases cited in Note 2 to his section 104 b, on page 157. At the end of said Note 2 is the following:

"That foreign laws conflicting with home policy are invalid." (See 10 Wheat., 66; 14 Johnson, 338; 23 Ark., 523.)

The present case, being one vitally affected by the state of comity due, as between the United States and the British dominions, it is, therefore, pre-eminently a

case where the state of that comity must be carefully looked to.

Now, as bearing on the effect of holding, in the case at bar, that this Canadian judgment was conclusive of the merits, in the way of depriving plaintiff in error of his constitutional right to a trial by jury, the opinion of Chief Justice Campbell in the case of *Bank of Australasia* v. *Nias* (16 Adolphus & Ellis, N. S., 717, 736) is one having vital significance in the case at bar.

It will be seen, in that case, that the Chief Justice recognizes the fact, and proceeds on the assumption, that, did the law of the British colony of New South Wales not secure to the defendant in that case a jury trial, the court would have held against the conclusiveness of the foreign judgment in that case. The court was careful to place the stress of its opinion, in favor of the conclusiveness of the judgment, on the fact that the defendant had had *one* jury trial under British law and was not entitled to *two*, and had, in addition to that, the right of appeal (and which he had exercised) to the Judicial Committee of the Queen's Privy Council, and which council, the Chief Justice is careful to say, would set the judgment aside if it were found to be "*unjust*" (see page 736), *and it was on these considerations* that the court reached the conclusion in favor of the conclusiveness of the judgment in that case.

It is perfectly plain, from this opinion, that, had the judgment been rendered in a court, and under conditions where to hold it conclusive would have deprived the defendant of all trial by jury under British law, and of all right of appeal to a British tribunal for the purpose of *reviewing* the question of the "justice" of the judgment, then the court would have held against the conclusiveness of that judgment.

Should the judgment below, in the case at bar, be affirmed, then the result is that the plaintiff in error is

not only denied all possibility for a jury trial, on the merits, under the laws of his own Constitution and country—is denied not only all appeal, as to the merits, to any tribunal of his own Government—but, as his answer shows, is denied *all* trial on the merits, and every semblance of a hearing, in any court—English or American, Hindoo or Hottentot.

Foreign Judgments, Founded in Fraud, or Flagrantly Unjust, not Conclusive.

But if the position just stated shall not meet the sanction of this court, we now proceed to show that, even if the courts of the United States can give the effect of conclusiveness to a foreign judgment, yet the state of the decisions, both English and American, is such that this court, when now, practically, for the first time in its history, is called upon to pass upon this supremely important question, will not find itself either embarrassed or concluded, by the decisions of other countries, or of our own courts, to that effect, so that it can not refuse to give foreign judgments extra-territorial force beyond being merely *prima facie* evidence of indebtedness.

The state of the law in England on this subject, up to 1834, will be found expressed in the opinion of Lord Brougham in the case of *Houldich* v. *Donegall* (2 Clarke & Finelly, 476). The syllabus of this case is as follows:

"The creditors of a person resident in Ireland filed a bill in the English Court of Chancery, and obtained a decree for an accounting, &c., and afterwards (the property of the debtor lying chiefly in Ireland) filed a bill in the Court of Chancery there, praying to have the full benefit of the proceedings in the English suit. The Court of Chancery in Ireland dismissed such second bill as for want of jurisdiction. *Held*, that the judgment of the Court of Chancery in Ireland was erroneous; that the proceedings in the English Court of Chancery were

in the nature of a foreign judgment, and were to be treated as such in Ireland, *namely, as prima facie evidence of right in the party who had obtained the judgment. Held,* also, that this House could either remit the case with directions, or appoint the receiver, and take such other proceedings as the Court of Chancery in Ireland might have done."

The opinion in the case, by the Lord Chancellor, begins at page 476, and contains a rather full presentation of the then existing authorities bearing upon the question there involved. At page 477 the following language occurs:

"The question has been a *vexata questio* in our courts, and numerous *dicta* have been uttered upon the point whether a foreign judgment is only *prima facie* the ground of action, or whether it is conclusive and not traversable. The language of the opinions on one side has been so strong that we are not warranted in calling it merely the *inclination* of our lawyers. It is their DECISION that, in this country, a foreign judgment is only *prima facie,* not conclusive, evidence of a debt. *One argument is clear that the difference between our courts and their courts is so great that it would be a strong thing to hold that our courts should give a conclusive force to foreign judgments, when, for aught we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment.* In *Buchanan* v. *Bucker* (1 Campbell, 63; 9 East, 192) it was found that the judgment had been given without there having been an appearance of the party against whom that judgment was passed; and is it to be endured that the courts of this country should be bound by that which is not founded upon any rational principle of proceeding? So with regard to other cases of decisions of foreign courts, for the principles of the law are different in each—the law of Algiers, for instance, might otherwise be held binding in our courts—Algiers, where we have only a consul, or the law of Turkey, where we have an ambassador, might be so recognized. If that were the case, the law of a foreign country might be made to have the effect of binding land in this country. In those two countries a

man is allowed more than one wife. Suppose the law of that country held conclusive here, and then you might be called on to make a declaration that the son of the second marriage was heir, though the daughter of a first marriage (both wives being still living) was in existence, which would be against our law, that does not recognize a second marriage during the existence of the first; and yet the *lex loci contractus* would say that such a descent was valid. I give these as instances or examples of what would be the consequences of holding that foreign sentences were in themselves valid; *but they also illustrate the expediency and soundness of the view that the judgments of foreign courts are traversable.*"

Surely this decision by the House of Lords must be taken, as, for a time at least, it was taken in England, as settling the law, for England and her provinces, on this supremely important snbject; and this was only so far back as 1834.

In *1 Greenleaf's Evidence, Sec. 546* (13 ed.), is found a statement of the state of the English decisions, as follows:

"In the next place, as to judgments *in personam* which are sought to be enforced by a suit in a foreign tribunal. There has certainly been no inconsiderable fluctuation of opinion in the English courts upon this subject. It is admitted on all sides that, in such cases, the foreign judgments are *prima facie* evidence to sustain the action, and are to be deemed right until the contrary is established; and, of course, they may be avoided if they are founded in fraud, or are pronounced by a court not having any competent jurisdiction over the cause. But the question is, whether they are not deemed conclusive, or whether the defendant is at liberty to go at large into the original merits to show that the judgment ought to have been different upon the merits although obtained *bona fide.* If the latter course be the correct one, then a still more embarrassing consideration is to what extent and in what manner the original merits can be properly inquired into. But though there remains no inconsiderable diversity of opinion among the learned judges of

the different tribunals, yet the present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments."

In the note 4, by the editor, Mr. May, of this 13th edition, reference is given to the conflicting English authorities; but, in estimating the force of this note, it must not be forgotten that the note was prepared long before the case of *Abouloff* v. *Oppenheimer* was in existence.

Certainly up to the date of the decision of the House of Lords in the case of *Houlditch* v. *Donegall* (*supra*), the American cases agreed with that decision; and we submit that the weight of these decisions is still to the same effect.

In volume 3, page 534, of *The American and English Encyclopædia of Law* will be found a citation of the cases showing that such is the present tendency of the American courts.

In the case of *Buttrick* v. *Allen* (8 Mass., 272) suit was brought on a judgment rendered in Nova Scotia, and the court held:

"There is no doubt that assumpsit lies upon a foreign judgment, but the judgment is no more than *prima facie* evidence, and the defendant has all the rights he would be entitled to in an action upon the original case."

In the case of *Bissell* v. *Briggs* (9 Mass., 462), decided in 1813, which was an action of debt on a judgment recovered in a New Hampshire court, Chief Justice Parsons distinguishes between the judgments of the States and foreign judgments, and, speaking of the latter, says:

"But if the foreign court rendering the judgment had jurisdiction of the cause, *yet the courts here will not execute the judgment without first allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as presumptive evidence of a debt or as prima*

facie evidence of a sufficient consideration of the promise where said court had jurisdiction of the case; and if an action of debt be sued on any such judgment, *nil debit* is the general issue; or, if it be made the consideration of a promise, the general issue is *non assumpsit.* On these issues the defendant may impeach the justice of the judgment by evidence relative to that point. On these issues the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court which had no jurisdiction, and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment."

This case of *Bissell* v. *Briggs* (9 Mass., 462), so far as it relates to each class of judgments, to wit, judgments within the several States of the Union, and foreign judgments, proper, has never been, so far as we can find, doubted or questioned as to either of the propositions which we have quoted from the opinion of Chief Justice Parsons. On the contrary, it has taken and retained its place in the history of the judiciary of Massachusetts as a leading and conspicuous case, repeatedly receiving the highest commendations from the Supreme Court of Massachusetts.

It will be found cited, with approval (generally as to the force of judgments of sister States), in 12 Mass., 25; 17 Mass., 545; 6 Pickering, 241; *Ib.*, 242; *Ib.*, 244; *Ib.*, 245; *Ib.*, 246; *Ib.*, 247; 11 Pickering, 390; *Ib.*, 4; Metcalf, 336; *Ib.*, 337; *Ib.*, 341; 5 Gray, *Ib.*, 10; *Ib.*, 12 Gray, 202; 13 Gray, 594; 16 Gray, 115; 7 Allen, 55; *Ib.*, 458; 14 Allen, 339; *Ib.*, 340, and 98 Mass., 448. Every one of these references is with approval.

The following is the language of the note, on page 737 of 16 Adolphus & Ellis, new series (71 Eng. Com. L.):

"A foreign judgment is only *prima facie* evidence, citing 1 Mass., 400; 8 Mass., 273; 9 Mass., 462; 11 Mass., 256; 1 Caines, 460; 6 Pick., 232; 1 Tyler, 233; 3 Shepley, 167; 13 Ohio, 209; 2 Barb., 602."

This note adds:

"These cases go very far to sustain the proposition that the doctrine of the American courts is that in a suit on a judgment of a foreign court, not merely the jurisdiction of the court and the question of fraud are examinable, but the consideration—in other words, the justice of the foreign determination."

The state of the American decisions is also set forth in *1 Greenleaf on Evidence* (13th edition), Sec. 547, as follows:

"The general doctrine maintained in the *American courts*, in relation to foreign judgments *in personam*, certainly is that they are *prima facie* evidence, but that they are impeachable. But how far, and to what extent, this doctrine is to be carried, does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into, and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn."

In 2 *Phillips on Evidence* (5 Am. ed.), page 157, in the text, the author sums up the result of the cases in America in these words:

"In the American States a foreign judgment, when used as the foundation of an action, is never more than *prima facie* evidence, and the defendant may impeach it by showing that it was irregularly obtained, or, indeed, upon almost any ground which would have constituted a defense to the original suit."

At page 159 of the same volume, in the notes of Cowan & Hill, side pages 185–6, the result of the American cases is thus stated:

"The American authorities, although professing to follow the course of the English adjudications on this subject, maintain a docrine diametrically opposite to them, as the latter are now understood. According to the

former, a foreign judgment, when produced as the foundation of an action in the courts of this country, is never more than mere *prima facie* evidence, and a defendant may impeach it by showing that it was irregularly obtained, or, indeed, upon almost any ground which would have constituted a defense to the original suit. *Barney* v. *Patterson's Lessee*, 6 Har. & Johns., 182; *Taylor* v. *Phelps*, 1 Har. & Gill, 492; *Bartlet* v. *Knight*, *Id.*, 401; *Smith* v. *Lewis*, 3 Johns. Rep., 157; *Taylor* v. *Bryden*, 8 *Id.*, 173; *Hubbell* v. *Coudrey*, 5 *Id.*, 172; *Smith* v. *Williams*, 2 Cain Cas. in Err., 110; *Hitchcock* v. *Aiken*, 1 Cain Rep., 460; *Betts* v. *Death*, Addison's Rep., 265; *Stoddard* v. *Allen*, N. Chip. Rep., 44; *Curtis* v. *Gibbs*, 1 Penning Rep., 429; *Buttrick* v. *Allen*, 8 Mass., 273; *Waddams* v. *Burnham*, 1 Tyl. Rep., 233; *Hall* v. *Williams*, 6 Pick., 232; *Gulick* v. *Loder*, 1 Green, 68; *Warren* v. *Flagg*, 2 Pick., 448; *Robinson* v. *Prescott*, 4 N. H., 450; *Benton* v. *Burgot*, 10 Serg. & Rawl, 240; *Winchester* v. *Evans*, Cook's Rep., 420; *Hoxie* v. *Wright*, 2 Verm. Rep., 267; *St. Albans* v. *Bush*, 4 *Id.*, 58."

In the eighth edition of *Story on the Conflict of Laws*, Sec. 608, is the same statement as that quoted from Greenleaf (*supra*), and in note (*a*) Biglow, after stating that this doctrine was founded upon *dicta* of English cases since overruled, and that a foreign judgment is conclusive of all facts of which a domestic judgment would be conclusive, adds the following:

"It can not yet be said, *on authority*, that the effect of a foreign judgment *in personam*, rendered in a foreign country, is *settled in this country*; but it is apprehended that the *tendency* of the courts is with the later English cases above cited."

It is quite apparent that the law on this subject is in an unsettled condition. The courts here and abroad have not reached, by their decisions, a rule so fixed (except that foreign judgments are to be deemed *prima facie* evidence of indebtedness) that this court will be in the least embarrassed in taking up the question and dealing

with it according to its conception of what the rule ought to be; and, certainly, when such a question as this is to be determined, which so largely affects the interests of the people of this nation, no rule should be regarded as settled until this court of last resort to the people of the United States has given to it its sanction.

If a question of international law is to be settled by judicial decisions, if comity or reciprocity is to be established by the adjudications of courts, it should not be considered to be established until the voice of this court is heard in that regard; and we, therefore, invoke the judgment of this court to the effect that a foreign judgment shall have no extra-territorial force beyond the mere fact that it may be regarded as *prima facie* evidence of indebtedness—a doctrine that universally prevailed until within a very recent period, and the departure from which, so far as there has been a departure, has not yet had the sanction of this court.

With this in view, we now invite the attention of the court to some further authorities on this subject.

In *Lawrence's Wheaton on International Law* (2d annotated edition), pages 292, 293, it is said:

"But no sovereign is bound, unless by special compact, to execute, within his domains, a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, *at liberty to examine into the merits of such judgment*, and to give effect to it or not, as may be found just and equitable. The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are *reciprocally* carried into execution, under certain regulations and restrictions, which differ in different countries.

"By the law of England, the judgment of a foreign tribunal, of competent jurisdiction, is conclusive where the same matter comes incidentally in controversy be-

tween the same parties; and full effect is given to the *exceptio rei judicatæ* where it is pleaded in bar of a new suit for the same cause of action. A foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to the English courts to enforce it; and it lies on the defendant to impeach the justice of it, *or to show that it was irregularly obtained.* If this is not shown, it is received as evidence of a debt for which a new judgment is rendered in the English courts, and execution awarded. But if it appears by the record of the proceedings on which the original judgment was founded, that it was *unjustly or fraudulently obtained,* without actual personal notice to the party affected by it; or if it is clearly and unequivocally shown, by extrinsic evidence, *that the judgment has manifestly proceeded upon false premises, or inadequate reason, or upon a palpable mistake of local or foreign law, it will not be enforced by English tribunals.*

"The same jurisprudence prevails in the United States of America in respect to judgments and decrees rendered by the tribunals of a State foreign to the Union. As between the different States of the Union itself, a judgment obtained in one State has the same credit and effect in all the other States which it has by the laws of that State where it was obtained; that is, it has a conclusive effect over domestic judgments."

To the same effect is the following from *2 Kent's Commentaries,* page 120:

"No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; *and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment, for the effect to be given to foreign judgments is* ALTOGETHER *a matter of comity in cases where it is not regulated by treaty. In the former case of a suit to enforce a foreign judgment, the rule is that the foreign judgment is to be received, in the first instance, as prima facie evidence of the debt, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly or unduly obtained.* This was the principle declared and settled by the House of Lords, in 1771, in the case of *Sinclair* v. *Fraser,* upon an appeal from the Court of Session in Scotland."

In Note "a" on said page is a valuable collection of the authorities in England and America on *both* sides of this vexed question; but it will be seen in said note that *all* of the authorities agree that, in order that a foreign judgment shall be conclusive ground of action, that must appear which is stated in said note in the following words:

"It is requisite, however, in order to recognize and give effect, in any way, to a foreign judgment, that the court which pronounced it was competent to the case, and had due and lawful jurisdiction over the cause and the parties, and *that there had been* REGULAR *judicial proceedings; and this is the case whether the proceeding* which led to the judgment be *in rem* or *in personam.*"

In the same Note "a," in a quotation from *Story's Conflict of Laws*, will be found his statement of a radical and universally-asserted exception to the rule of conclusiveness applied in our courts to actions on foreign judgments. This exception Story states in these words:

"Except in cases in which the court which pronounced the judgment has not due jurisdiction of the case, or of the defendant, *or the proceeding was in fraud, or founded in palpable mistake or* IRREGULARITY, *or bad by the law of the rei judicatæ, and in all such cases the justice of the judgment ought to be impeached.*"

In *3 American and English Encyclopædia of Law*, at page 530, is found the following:

"It is said that a sovereign is not bound *jure gentium* to execute any foreign judgment within his dominions, and that, if execution of such an one is sought in his dominions, *he is at liberty to examine into the merits of the judgment, and to refuse to give it effect where it appears unjust and unfounded.*"

Citing—

2 Kent's Commentaries, 119, 120;
Story on the Conflict of Laws, secs. 598, 611, 618;
Bouleuois Obs. 25, p. 601.

In the same volume (of *3 Am. & Eng. Ency. Law*), at page 528, speaking of judgments *in rem*, it is said:

"And the same principle applies to all proceedings *in rem* against movable property within the jurisdiction of the court pronouncing the judgment" (citing, in Note 4, a multitude of cases, among them *Croudson* v. *Leonard*, 4 Cranch, 434). *"But the judgment must be bona fide and without fraud, for if fraud intervenes it will avoid the force and validity of the judgment, however well founded the jurisdiction."*

Citing—

Morgan v. *Insurance Co.*, 1 Story's C. C., 157;
Bradstreet v. *Insurance Co.*, 3 Sumn., 600;
Dutchess of Kingston's Case, 11 State Trials, 355, 358;
Bowles v. *Orr*, 1 Young & C., 464;
Stark Ev., pt. 2, secs. 77, 79, 83.

Regarding the state of the American law touching the conclusiveness in our courts of foreign judgments regularly and honestly obtained, Mr. Freeman, in section 596 of his work on Judgments (4th edition, p. 1026), says:

"The majority of the reported American cases were decided prior to those English decisions which have resulted in enhancing the dignity of foreign judgments in that country. It will accordingly be found that the greater number of American courts at one time declared in favor of the law as stated in *Phillips* v. *Hunter* (2 Henry Blackstone, 410), and *by which any foreign judgment is regarded as examinable on the merits.*"

To this, in Note 1 to said section, at page 1027, the following cases are cited:

Story's Conflict of Laws, Sec. 608;
Bissell v. *Briggs*, 9 Mass., 461;
6 American Decisions, 88;
Bartlett v. *Knight*, 1 Mass., 400;
2 American Decisions, 36;
Buttrick v. *Allen*, 8 Mass., 273;
5 American Decisions, 105;

Jordan v. *Robinson*, 3 Maine, 167;
Pelton v. *Platner*, 13 Ohio, 209;
42 American Decisions, 197;
Boston, &c., Co. v. *Hoit*, 14 Vermont, 92;
Smith v. *Lewis*, 3 Johns., 157;
3 American Decisions, 469;
Benton v. *Burgot*, 10 Sergt. & Rawl., 246;
Taylor v. *Barron*, 30 New Hampshire, 79;
64 American Decisions, 281.

In *Burnham* v. *Webster* (1 Woodbury & Minot, 172), decided in the Circuit Court of the United States for the First Circuit, opinion by Woodbury, J., is thus expressed in the head note:

"Where a suit is brought on a note, and the defendant offers in evidence to bar it a former judgment in a foreign court, where the writ counted on this and another note, and the judgment was entered upon the other, but on this the defendant was discharged, it was held that this foreign judgment *was only prima facie evidence in favor of what it decided*, and that the plaintiffs in this case might prove that the note now in suit was withdrawn in the trial abroad, and not passed on by the jury or court, and in that event it was not barred by the foreign judgment.

"Judgments, foreign or domestic, ought not to bar subsequent suits generally, unless between the same parties, or their privies, and for the same matter, before and once actually litigated and decided on by the court.

"The force of former judgments between the same parties, whether foreign or domestic, or in different States of the Union, and whether *in personam* or *in rem*, considered."

At page 175 Justice Woodbury states the following:

"In relation to foreign judgments, some cases maintain that they are in all respects to be treated as domestic judgments, while others insist on various exceptions

or qualifications, and, among them, one broad enough to render the parole evidence competent which was offered in the present case.

"My own impressions in relation to foreign judgments are these:

"They do, like domestic ones, operate exclusively *ex proprio vigore* within the governments in which they are rendered, *but not elsewhere.* When offered and considered elsewhere, they are *ex comitate*, treated with respect, according to the nature of the judgment and the character of the tribunal which rendered it, *and the reciprocal mode, if any, in which that government treats our judgments*, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it, in some degree, the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus.* With these views, I would go the whole extent of the cases decided by Lords Mansfield and Buller; and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, *I would consider it only prima facie evidence as between the parties to it. Sinclair* v. *Fraser* (1 Dougl., 5, *note*); *Walker* v. *Witter* (*Ib.*, 1); *Hall and Odber* (11 East, 118)."

The review of the authorities in this opinion by Justice Woodbury seems to be very full and complete.

It would be quite useless to go through all the American cases holding the same doctrine as that stated in the cases just specifically cited, and in the cases cited in said note 1 to section 596 of *2 Freeman on Judgments.*

In volume 3, page 534, of the *American and English Encyclopædia of Law*, the author says:

"The tendency of recent decisions is to restrict the force of foreign judgments when they are relied on as a cause of action in another State."

Next take, for example, the case of *Taylor* v. *Bryden* (8 Johns., 176). This case is pointed to by Mr. Freeman as an example of the cases showing the modern tendency

of our courts in the direction of giving foreign judgments greater conclusiveness; but, even in this case, Chief Justice Kent reaches the conclusion which he expresses in the following words:

"The general language of the books is that the defendant must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured."

Woolsey, in his work on *International Law* (sec. 77, p. 126), declares that England takes the position that it is only such foreign judgments as were not founded in "any irregularity" that England will enforce.

In the opinion of Chancellor Kent, in the case of *Taylor* v. *Bryden* (8 Johnson, *supra*), he quotes with approbation the following from the case of the *Duchess of Kingston* (11 State Trials, 222) as showing the decision reached by the House of Lords:

"But, upon appeal to the House of Lords, the judgment of the Court of Sessions was reversed, and the rule of law was stated in the judgment of reversal 'that the judgment of the court of Jamaica ought to be *received as evidence prima facie of the debt, and that it lies on the defendant to impeach the justice of it or to show that it was irregularly or unduly obtained.*' This decision was cited in *Galbraith* v. *Neville* (Dougl. Rep., 3 edition, page 5, note), and Justice Buller said that it had always been considered as establishing the true rule."

It is proper here to fix carefully in mind a distinct principle of this branch of the public law, which is thoroughly settled and now undisputed.

It is that each nation for itself, in the absence of positive law, as found in statutes, treaties, or constitutions, decides, by means of the high judicial discretion exercised by its courts, what shall be the degree of force accorded to foreign laws, including foreign judgments, within such nation.

This is stated in *Wheaton's International Law*, page 162, in these words:

"A State is not obliged to allow the application of foreign laws within its territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. *In the event only of the law being* silent, THE COURTS MAY JUDGE, *in the particular cases, how far to follow the foreign laws and to apply their provisions.*

"There is no obligation recognized by legislators, public authorities, and publicists to regard foreign laws, but their application is admitted only from considerations of utility and the *mutual* convenience of States—*ex comitate, ob reciprocam utilitatem.* The public good and the general interests of nations have caused to be accorded in every State an operation more or less extended to foreign laws. Every nation has found its advantage in this course. The subjects of every State have various relations with those of other States; they are interested in the business transacted and in the property situated abroad. Thence flows the necessity, or at least utility, for every State, in the proper interest of its subjects, to accord certain effects to foreign laws, and to acknowledge the validity of acts done in foreign countries, *in order that its subjects may find in the same countries a reciprocal protection for their interests.* There is thus formed a tacit convention among nations for the application of foreign laws founded upon *reciprocal* wants. This understanding is not the same everywhere. Some States have adopted the principle of complete reciprocity by treating foreigners in the same manner as their subjects are treated in the country to which they belong; other States regard certain rights to be so honestly inherent in the quality of citizens as to exclude foreigners from them, or they attach such an importance to some of their institutions that they refuse the application of every foreign law incompatible with the spirit of those institutions.

"But when neighboring nations have permitted this

extension they are not to be deemed to have subjected themselves to a foreign statute, *but to have allowed it only because they have found it in their interest by having, in similar cases, the same advantage for their own laws among their neighbors.* This effect given to foreign laws is founded on a kind of *comity* of the law of nations, by which different peoples have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment."

See this expressly laid down in section 36 of *Story's Conflict of Laws* (8 ed.), and abundantly illustrated and enforced in sections 37 and 38, and their notes.

The result, therefore, as applied to the case at bar of this principle, which asserts that (here adopting the language of Mr. Wheaton), "*in the event of the law being silent, the* COURTS MAY JUDGE, IN THE PARTICULAR CASE, *how far to follow the foreign laws and apply their provisions*" within their States, is clearly this: That, so far as relates to the question whether more than *prima facie* force shall be accorded, in our courts, to foreign judgments sued on here, this court must, in the unsettled condition of the public law, to which we have pointed, regarding this question, in the exercise of its supreme judicial discretion, adopt for this country a rule establishing the line between the classes of foreign judgments which will be and the class which will not be enforced in the United States courts. We mean by this that this must be done by this court, *provided* the court shall not conclude that it is unnecessary to decide as to the *prima facie* force of such judgments, because the law of *Abouloff* v. *Oppenheimer* (*supra*) rules the case at bar.

It is undoubtedly a sound proposition, as stated in the authorities above quoted, that no nation is under any obligation to give effect, in its courts, to the judgments of a foreign tribunal, and it seems to us that, in the absence

of treaty stipulation (even if it could be controlled by treaty stipulation), the courts ought not to surrender their power to inquire into the merits of the foreign judgment which they are called upon to execute.

A judgment thus presented should have no higher authority or greater effect than a promissory note or bill of exchange, upon which, if suit were brought, the defendant could show any of the well-known defenses to such instruments.

II.

Alternative Position as to Want of Conclusiveness.

If this court, however, shall reach a different conclusion, then our next proposition is that such a judgment may be impeached for want of jurisdiction in the court rendering it, or for fraud, mistake, or because it was unfairly, irregularly, or unduly obtained.

In section 654 of *Wharton on the Conflict of Laws*, after stating that want of jurisdiction of the person or subject-matter may always be shown in an action on a foreign judgment, the author adds:

"So it has been held that a foreign judgment can be contested for fraud in its concoction" (citing *Fillimore Int. Law*, iv. 678; *Foote's Priv. Int. Law*, 449; Blackburn, J., *Goddard* v. *Gray*, L. R., 6 Q. B., 149; *Ochsenbein* v. *Papelier*, L. R. 8, ch. 695; *Wood* v. *Watkinson*, 17 Conn., 500; *Welsh* v. *Sykes*, 3 Gilm., 197); "or for its flagrant violation of justice" (citing, *Price* v. *Dewhurst*, 8 Sim., 279; *Ferguson* v. *Mahon*, 11 Ad. & E. 181; *Henderson* v. *Henderson*, 6 Q. B., 298; *Cowan* v. *Braidwood*, 1 M. & Gr., 897; *Sinclair* v. *Fraser*, 1 Dougl., 4 a; *Blake* v. *Smith*, 8 Sim., 303; *Ochsenbein* v. *Papelier*, L. R. 8, ch. 695; *Ilsley* v. *Nichols*, 12 Pick., 270; *Dunlop* v. *Cody*, 31 Iowa, 260); "or for non-identity of subject-matter" (citing *Ricardo* v. *Garcias*, 12 Cl. & F., 368; *Burnham* v. *Webster*, 1 Wood

& M., 172); "or for incurable defectiveness or obscurity" (citing, *Obicini* v. *Bligh*, 8 Bing., 335); "or for manifest errors in its processes" (citing, *Reimers* v. *Druce*, 23 Beav., 145; *Simpson* v. *Fogo*, 1 Johns. & Hem., 18; 1 Hem. & M., 195; *Windsor* v. *McVeigh*, 93 U. S., 274; *Infra*, sec. 796); "or, generally, for any jurisdictional violation of the principles of international law," (citing, *Shaw* v. *Gould*, L. R., 3 H. of L., Ap. 55; *Bank* v. *Nias*, 16 Q. B., 717; *Liverpool Marine Co.* v. *Hunter*, L. R. 3, ch. 479; *Baring* v. *Clagett*, 3 B. & P., 215; *Wolf* v. *Oxholm*, 6 M. & Sel., 92; *Simpson* v. *Fogo*, 1 Johns & Hem., 18; 1 Hem. & M., 195; *Kerr* v. *Condy*, 9 Bush, 372).

It is undoubtedly the result of all the authorities that undertake to give a greater force to a foreign judgment than mere *prima facie* evidence of indebtedness; that if fraud enters into a judgment, the judgment may be impeached for that fraud; that, if the judgment is obtained by fraud or mistake, or is irregularly, or by flagrant injustice, obtained, it is impeachable because thus obtained.

And herein lies a difficulty which we submit sustains our contention under our first proposition, to wit, that it involves the question as to what kind of fraud will be sufficient to impeach a judgment, or what kind of mistake, or irregularity, or what kind of injustice, or undue procurement, will be sufficient to impeach a foreign judgment.

Different courts take different views of cases that may be presented to them, and, because of this fact, it seems to us to be impossible to lay down any definite rule, except the rule of *prima facie* force, on the subject. One court says that "intrinsic fraud" is sufficient; another might say that it must be "extrinsic fraud" in order to accomplish this result. Courts differ very widely as to what constitutes a fraud that will impeach a foreign judgment, and so on; and, therefore, to undertake to lay down a rule, by the decisions of courts, that shall operate as

comity or reciprocity in matters of this kind seems to us to be impossible, if the rule of *prima facie* force is abandoned.

But certainly the courts of this country will not accord to the judgments of British courts a force and effect that the British courts deny to the judgments of our courts, or deny to the judgments of all foreign tribunals. To give to the judgments of their courts a greater degree of conclusiveness and effect than their courts accord to the judgments of others would not be reciprocity. Reciprocity means no more than equality. It means no more than the granting of equal and reciprocal favors. There would be no true comity or reciprocity in giving to the judgments of a foreign tribunal a force in this country that would not be accorded to a judgment of a court of this country in that foreign country.

In the case of *McEwan* v. *Zimmer* (38 Mich., 765, 769), decided in 1878, opinion by Cooley, J., regarding the rule of comity and reciprocity between us and Canada, the court says:

"We should never have the assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality. We should demand nothing more and concede nothing less."

In section 36 of *Story on the Conflict of Laws* (8th ed.) is the following. Speaking of the rules, etc., controlling the matter of comity between nations, he says:

"But of the nature and extent and utility of this recognition of foreign laws, respecting the state and condition of persons, every nation must judge for itself, *and certainly is not bound to recognize them when they would be prejudicial to its own interests. The very terms in which the doctrine is commonly enunciated carry along with them necessary qualification and limitation of it.* MUTUAL *utility presupposes the interest of all nations is consulted, and not that of one only.*"

In section 37, quoting from Vattel, the author says:

"That it belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it, of what it can do or can not do, of what is proper or improper for it to do."

In section 38 the author says:

"In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, *unless* THEY *are repugnant to its policy or prejudicial to its interests.*"

In *Bank of Augusta* v. *Earl* (13 Pet., 589), speaking of this matter of international comity, the court says:

"The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; *and is inadmissible when contrary to its policy, or prejudicial to its interests.* * * * It is truly said in Story's Conflict of Laws, 37, that 'in the silence of any positive rule affirming or denying or restraining the operation of foreign laws, *courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests.*'"

The whole point of these citations, as applied to the case at bar, is this obvious and most important one, namely, that in extending to the courts of England, in this, its Province of Ontario, the comity which will recognize, in our courts, the force of the Canadian judgment, it is impossible to hold that, under this rule of the public law, one nation is required, or permitted, to accord to another nation courtesies—comities—which that other nation denies, in like cases, to our own and other nations. It is impossible to rationally assert that if, when in a Canadian court, a suit is brought on an American judgment, that Canadian court will overthrow

the American judgment wherever they find that the judgment was flagrantly unjust, and was procured by the kind of fraud practiced, by the successful party, in the case of *Abouloff* v. *Oppenheimer* (*supra*), and yet, when a Canadian judgment is sued on in an American court, in an action brought by a Canadian subject against an American citizen, that American citizen shall be *denied* the right to set up a like defense with that which defeated his action, brought in Canada, on the American judgment.

That the application of such a rule of gross injustice and inequality would be violative of every principle belonging to the laws of reciprocal comity as recognized between nations, and would be "repugnant to the policy and prejudicial to the interests" of the people of the United States, is simply self-evident and can not be, by our courts, tolerated.

Therefore, if the laws in force in the Province of Ontario be such as are laid down in the said case of *Abouloff* v. *Oppenhiemer*, then, beyond all possible question, the plaintiff in error is entitled to have applied, in the present case against him, the same rules, as to the defense he shall be permitted to make, that the courts of Ontario would apply to him in an action by him on a judgment rendered in the courts of the United States.

III.

State of Law in England and Her Provinces as to Force of Foreign Judgments.

We now proceed to show that it is a fixed and settled law in England and Canada that a judgment procured as this judgment was procured would be regarded as so tainted with fraud that the English courts would not enforce it, and, if we succeed in showing this, then, obvi-

ously, this demurrer to the answer of plaintiff in error should have been overruled.

The case of *Abouloff* v. *Oppenheimer* (10 Queen's Bench Division, 295 *et seq.*, *supra*), decided in 1882, was one in which the plaintiff sued the defendant in a Russian court to recover the possession of certain goods, or the value thereof, and obtained a judgment for the value of the goods. The case was taken to the highest court of the Empire, and the judgment was there affirmed.

Afterwards suit was brought upon this judgment in an English court, and the defense was set up that, at the time of the bringing of the suit and the rendition of said judgment in the Russian court, the plaintiff had the goods in her own possession, and to that defense a demurrer was interposed. It was contended, by plaintiff, that the foreign judgment was conclusive; that the defense set up had been available to the defendant in the Russian court.

The English court overruled the demurrer, and held that the bringing of the suit for the return of the property which the plaintiff had in her own possession and the recovery of a judgment thereon was a fraud, which would defeat that judgment; or, in other words, the English court held that it would not enforce a judgment that had been procured by a party who had in her own possession the very property for which she sued, and for the value of which she recovered the judgment.

Now, obviously, this proceeded upon the ground that when the plaintiff brought that suit she knew that she had no cause of action; that she had those goods in her own possession, and that she was not entitled to recover a judgment against the defendant for the possession, and that she knew that it was not conscionable to take a judgment for the value of goods which the defendant did not have, but which she herself did have.

The syllabus in this case is as follows:

"*A foreign judgment, obtained by the fraud of a party to the suit in the foreign court, can not be afterwards enforced by him in an action brought in an English court, even although the question whether the fraud had been perpetrated was investigated in the foreign court, and it was there decided that the fraud had not been committed.*

"*To an action claiming the value of certain goods, and brought upon a foreign judgment, whereby the defendants were ordered to return to the plaintiff the goods, or to pay to her their value, the defense alleged that the plaintiff obtained the foreign judgment by fraudulently representing to the foreign court that the goods were not then in her possession, and by fraudulently concealing from the foreign court that the goods then were in her possession and were concealed by her.* HELD, *upon demurrer, that the defense was good.*"

At page 300, *et seq.*, the Chief Justice, in his opinion, states as follows:

"I may state the arguments for the plaintiff also in somewhat different words, namely, that, although the Russian courts at Tiflis were led to decide against the defendants through believing a false state of facts to exist, owing to the fraud of the plaintiff, nevertheless the defendants are not now at liberty to say that the judgments against them were procured by that fraud. Certainly this contention seems unreasonable. Many authorities, from *The Dutchess of Kingston's Case* (2 Sm. L. C., 8 edition, 784) down to our own time, have been cited during the argument, but none of them throws a doubt upon the broad proposition that where a judgment has been obtained by fraud of a party to a suit in a foreign country he can not prevent the question of fraud being litigated in the courts of this country when he seeks to enforce the judgment so obtained.

"The justice of that proposition is obvious; if it were not so we should have to disregard a well-established rule of law, that no man shall take advantage of his own wrong, and we should have to lay down a legal proposition, that where a judgment has been obtained in the courts of a foreign country by a fraud and by a wrongful

act, nevertheless the person obtaining it can take advantage of that fraud and of that wrongful act, and in the courts of this country can enforce the judgment so obtained.

"I do not think it necessary to inquire for the present purpose what is the strictly accurate mode of stating the proposition on which the courts of this country enforce the obligation created by foreign judgments. It has been stated by Parke, B., in *Williams* v. *Jones* (13 M. & W., 628, 633), with the assent of Lord Blackburn in *Goddard* v. *Gray* (Law Reports Q. B., 139, 148), and in *Schebsby* v. *Westenholz* (Law Reports Q. B., 155, 148), in one way, and it has been stated by Lord Brougham in *Houlditch* v. *Donegall* (2 Clarke & Finnelly, 477), and apparently by other great authorities in another. *Non nostrum est tantas componere lites.* It is enough for me to say that the English courts do enforce obligations created by foreign judgments, *but it has always been held in the courts of this country to be an answer to an action upon a judgment that the judgment was obtained by the fraud of the party seeking to enforce it.*

"This principle has been laid down in the broadest terms by DeGrey, C. J., in the answer to the two questions of the House of Lords in *The Duchess of Kingston's case* (2 Sm., L. C., 8th edition, 794), namely, that fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal. In that case one of the questions put to the judges was whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage was conclusive evidence so as to stop the counsel for the crown from proving the marriage in an indictment for bigamy; and, speaking of this sentence, DeGrey, C. J., says (2 Sm., L. C., 8th edition, 784): 'Like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the court was mistaken, *it may be shown that they were misled.*'

"I believe that the principle has never been either better or more tersely or neatly stated than it was in the foregoing passage; and, as it appears to me, the question for the courts of this country to consider is whether, when a judgment is sought to be enforced by an action

in this country, the foreign court has been intentionally misled by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment. From the time of the decision in *The Duchess of Kingston's case* (2 Sm., L. C., 8th edition, 784), until the present time, it has been held that fraud of that kind can be pleaded in the courts of this country to an action on a judgment, and that, if it can be proved, it vitiates the judgment and discharges the defendant from the obligation which would otherwise be thereby created.

"I shall not go through the various authorities which have been cited before us, but I find the principle stated in the broadest manner by Lord Campbell, C. J., in *Bank of Australasia* v. *Niass* (16 Q. B., 717); and it is treated as a clear proposition by Lord Selborn, L. C., in *Ochsenbein* v. *Papelier* (Law Reports 8, ch. 695). In the course of his judgment the Lord Chancellor cited a number of authorities, both text writers and judicial decisions; and, dealing with the observations of the present Lord Blackburn in *Goddard* v. *Gray* (Law Reports 6, Q. B., 139, on which there has been some comment and argument before us to-day, he gives his high authority for saying that Lord Blackburn did not intend those observations to conflict with this clear proposition.

"An ingenious attempt has been made to take this case out of the general proposition, and to call in aid another equally clear proposition, namely, that the courts of this country, in dealing with a foreign judgment, will not inquire whether the foreign court pronounces a judgment correct in point of law, or right and accurate in point of fact, and that, inasmuch as the defense now relied upon might have been, and perhaps was, brought before the foreign court, which decided against the allegation of fraud, the court, in the words of DeGrey, C. J., was mistaken and not misled. The answer to that contention has been given in the course of the argument for the defendants. *We are to decide whether the courts of Tiflis have been misled by the fraud of the plaintiff;* but the question whether they were misled never could have been submitted to them, never could have been in issue before them, and, therefore, never could have been decided by them. The English courts

are not either re-trying, or even re-discussing, any question which was, or could have been, submitted to the determination of the Russian courts.

"It has been suggested, also, that there ought to be some limitation as to the rule that the obligation arising on a judgment of a foreign court can be annulled by the defense that the foreign court has been misled and not mistaken if under any circumstances the fraud could have been brought under the notice of the foreign court. *I do not think that the general proposition, broad as it is, is to be subjected to any limitation of that kind; and I am of opinion that the fraud of the person who has obtained the foreign judgment is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country because the facts necessary to be proved in English courts were suppressed in the foreign court by fraud on the part of the person who seeks to enforce the judgment which the foreign court was by that person misled so to pronounce.* Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a court, it seems to me fallacious to say that because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled. It is plain that if it had been proved before the foreign court that fraud had been perpetrated with the view of obtaining its decision, the judgment would have been different from what it was.

"I think, therefore, on the broad ground that *no man can take advantage of his own wrong*, and that it is a principle of law that no action can be maintained on the judgment of a court, either in this country or any other, which has been obtained *by the fraud of the person seeking to enforce it*, that the defense is good, that the demurrer must be overruled, and that the judgment of the Queen's Bench Division was right."

Two other opinions were delivered in the case, one by Baggallay, L. J., another by Brett, L. J., both concurring in the conclusion reached by the Chief Justice, as indicated in the opinion which we have above quoted. The following extract we take from the opinion of Brett, L. J., found at pages 305 and 306:

"With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold according to the judgment of the House of Lords, adopting the proposition laid down by De Grey, C. J., *that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it the action in the English court will not* . . . *This proposition is absolutely without any limitation, and, as the learned Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation.*

* * * * * * *

"Whether it can be rendered effective by want of jurisdiction, or otherwise, is not a question before us.

"With one exception none of the authorities cited before us in the least militate against our decision. They all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by James, L. J., with the assent of Thesiger, L. J., in *Flower* v. *Lloyd* (10 Ch. D., 377). It seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party, and not fraud brought home to the party himself; moreover, it was, as I understand, fraud committed not before the court itself at the trial of the action, but previously to the case being brought to a hearing before the court. If it is to be taken that the doubts of James and Thesiger, L. JJ., related to the fraud of a party to the action committed before the court itself for the purpose of deceiving the court, I can not, after having heard the present argument, agree with the doubts expressed by them. These doubts are not binding, and no decision as to the effect of the fraud was pronounced by these lord justices in *Flower* v. *Lloyd* (10 Ch. D., 327). In the present case we have had to consider the question fully, and, according to the best opinion which I can form, *fraud committed by a party to a*

suit for the purpose of deceiving the foreign court is a defense to an action in this country founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff the result would be that a plausible deceiver would succeed, whereas a deceiver who is not plausible would fail. I can not think that plausible fraud ought to be upheld in any court of justice in England. *I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by fraud of the party relying upon it, it can not be maintained in the courts of this country; and, further, that nothing ought to persuade an English court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign court.* Judgment affirmed."

It is important to fix in mind the fact that this law of *Abouloff* v. *Oppenheimer* is, by the courts of the Province of Ontario, recognized as the law of that Province.

In the case of *Paisley* v. *Broddy* (11 Practice Reports, Ontario, p. 202), decided in December, 1885, opinion by Chief Justice Wilson, the action was brought in the Court of Queen's Bench of *Ontario* on a decree, dated November 5, 1884, against the defendant in the Court of Queen's Bench for the Province of *Manitoba*, in a case on the equity side of the court, wherein the plaintiff below was plaintiff and the defendant below was defendant. The syllabus in the case is in the following words:

"The plaintiff sued on a foreign judgment which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G, who had foreclosed the mortgage, and afterwards obtained judgment against the plaintiff on the covenant.

"*Held*, that the effect of G suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defense to this action.

"*Held*, also, that an allegation that G had agreed to

take the land in full satisfaction of his debt showed no defense, but a mere verbal agreement without consideration.

"*Held*, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of *fi. fa.* against him were retained in the sheriff's hands under a fraudulent agreement between G and the plaintiff in order to sustain the proceedings against the defendant, showed no fraud, and was no answer to the action.

"Per Wilson, C. J. The defendant was not at liberty to set up in the answer to this action matter which could have been pleaded in the original case."

At pages 205 and 206, in the opinion, is found the following:

"As there was no reason why the defendant could not have pleaded all these matters in and to the action, suit or proceedings which were taken against him by the plaintiff in the court in Manitoba, if they constituted a defense as going to the merits of these proceedings, and he did not do so, he is not at liberty now, in an action in this Province upon that foreign decree, to set up, in answer to said action, matters which could have been pleaded to those proceedings in the original court. *Henderson* v. *Henderson*, 6 Q. B., 288; *Messina* v. *Petrococchino*, L. R. 4 P. C., 144.

"The case of *Abouloff* v. *Oppenheimer*, 10 Q. B. D., 295, *was referred to, but in that case there was certainly fraud on the part of the plaintiff in recovering for goods as if in the possession of the defendant, while the plaintiff was himself in the possession of them and must have known the defendant had not got them. In that case the very point set up as fraud was in issue in the original action, and the fraud in the original action was allowed to be pleaded in the action in England upon that judgment. The matter which was in issue in the action which was brought in England upon the foreign judgment could not be brought in issue in England upon an English judgment recovered under like circumstances.* In the case before me there was no fraud in not informing the court that there had been a foreclosure, and that Gilmore was in possession of the land foreclosed."

This case shows two things of vital relation to the present discussion: first, that this law in the case of *Abouloff* v. *Oppenheimer* is in force in Canada now and furnishes the rule of reciprocity and comity that is accorded to judgments of foreign countries by the courts of Canada; and, second, the distinction between the conclusiveness accorded by the English and American courts to foreign judgments and that accorded to the judgments of their own courts.

Mr. Freeman cites with approval this case of *Abouloff* v. *Oppenheimer*, and also the case of *Ochsenbein* v. *Papelier* (*supra*), in notes 2 and 3, page 1019, of the last edition of his work on judgments, as showing the state of the English law.

It is important here to add, in connection with the case just cited, that the *same thing, in legal effect, is held in that case so much cited, and long regarded as a leading one, of the Bank of Australasia* v. *Nias* (*16 Adolphus & Ellis, New Series, 717; 71 Eng. Com. Law Rep., 717*), *where Chief Justice Campbell delivers the opinion.*

In that case ([redacted]) the judgment sued on was rendered in the English Colony of New South Wales. It will be seen, by an inspection of the opinion, that the Chief Justice throughout (pp. 734, 735, 736, 737), places emphasis on the fact that the judgment was one rendered in a court of a British colony, this in determining how far the judgment was impeachable and how far conclusive. It will also be observed that this opinion, delivered in 1851, after stating the conflict in the British authorities as to the conclusiveness of foreign judgments, declares that—

"It does not appear, however, that the question has ever been solemnly decided whether in an action on a foreign judgment the merits of the case upon which the foreign court has regularly adjudicated between the parties may again be put in issue and re-tried."

But what we especially desire to fix in the attention of the court, is the difference, as to conclusiveness, in the English courts, between a foreign judgment proper, and a judgment that was foreign only in the sense that it was rendered in one of the British colonies.

As to this point, the court is careful to say (s. p. 736; t. p. 734, 736) that *it was unnecessary for the court in that case to inquire as to how far the acts and judgments of a foreign court proper, and where there was no right of appeal, could be inquired into and impeached, because, in the case at bar, the court was bound to take judicial notice of the fact that the judgment was one rendered in one of the British colonies, and where there was an appeal from it to her Majesty, who would refer the appeal to the judicial committee of her Privy Council;* that whether an appeal in that case had in fact been taken (as it had been), it was contrary to principle and expediency to allow two trials on the merits by jury, the court adding these words:

"A regular mode having been provided by which a judgment of a colonial court may be examined and reversed, that mode ought to be pursued."

It is thus seen that the court did not undertake to lay down any rule regarding the conclusiveness of judgments rendered in foreign countries proper, and not in a British colony; that the court distinguished between colonial judgments and foreign judgments proper, and decided that the colonial judgment was conclusive of the merits, because the party had, in the colonial court, and in its appellate court (the Judicial Committee of the Privy Council) a jury trial on the merits.

This reasoning, and these grounds of decision, have no application to a foreign judgment proper, as is expressly stated here by the court, just as it is in the case of *Paisley* v. *Broddy* (*supra*).

Permit us now again to call attention to the character of the answer demurred to, to show how fully and exactly

the facts pleaded in that answer bring his case within the ruling of the court in *Abouloff* v. *Oppenheimer*. These facts so sought to be established by plaintiff in error were, *every one of them, shown, by the very nature of the case and subject-matter, to be fully within the knowledge of the defendants in error, and may be thus recapitulated:*

(1) The contract on which suit was brought in Canada was one where the covenants of the parties were mutual and dependent, and furnished no right of action except upon and after performance, or tender of performance, by the parties respectively.

(2) The consideration for the money sued for in Canada was the delivery to Ritchie of bonds and coupons by the defendants in error.

(3) No bonds or coupons, or anything of any value whatever, was either delivered to or received by Ritchie, deposited for him, or tendered for his use.

(4) The parties suing him did not have the bonds or coupons, were unable to deliver them, and had negotiated them for loans for their own benefit.

(5) Ritchie never received any consideration whatever, even to the amount of a farthing, for the thing for which he was sued and for which said judgment for $265,370.00 was rendered against him.

(6) This judgment was procured to be entered up when neither Ritchie nor his counsel were in court, Ritchie being absent in Ohio.

(7) No evidence whatever was furnished or tendered to the court, or considered by it, prior to the rendition of said judgment.

(8) No hearing was had before said court.

(9) On the 29th of February, 1888, in the absence of paintiff in error, Ritchie, and of his counsel, one of the judges of said court was procured, by the defendants in error, without evidence or a trial before him, or a submission of said cause to a jury, or the production, tender,

or filing of said bonds in said court, or without an order requiring the delivery of said bonds to plaintiff in error upon payment of said judgment, to direct that said defendants in error recover of the plaintiff in error the sum mentioned in the petition.

That this answer presents a case of the most gross and wanton fraud that can be stated seems to us exceedingly plain and brings the case clearly within the decision just cited of *Abouloff* v. *Oppenheimer*.

Please notice the strange, if not absurd, results in which our law would become involved if this court should accord to the judgment in question the conclusiveness which is claimed for it, and which was accorded to it by the court below.

So far as we can find, no case is in existence which asserts an obligation on the part of the courts of the United States and of the States respectively to accord to the judgments of *foreign States* equal conclusiveness with that required by our Constitution and laws to be accorded in the courts of the United States to judgments rendered within our own States.

Touching this matter, this court has stated, in *Christmas* v. *Russell* (5 Wall., 304), as follows:

"*Domestic* judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial, or by bill in chancery.

"COMMON LAW RULES PLACED FOREIGN JUDGMENTS UPON A DIFFERENT FOOTING, *and those rules remain, as a general remark, unchanged to the present time. Under these rules a foreign judgment was prima facie* EVIDENCE OF THE DEBT, AND WAS OPEN TO EXAMINATION, NOT ONLY TO SHOW THAT THE COURT IN WHICH IT WAS RENDERED HAD NO JURISDICTION OF THE SUBJECT-MATTER, BUT ALSO TO SHOW THAT THE JUDGMENT WAS FRAUDULENTLY OBTAINED. Recent decisions, however, in the parent country hold that even a foreign judgment is so far con-

clusive upon a defendant that he is prevented from alleging that the promises upon which it was founded were never made, or were obtained by fraud of the plaintiff."

It is uniformly held in multitudes of cases in our courts that in every suit brought in our courts, upon a judgment of a court of another of our States, there no higher degree of conclusiveness is accorded to such judgment so sued upon than is given to it by the laws of the State where the judgment was rendered.

This is not only the uniform holding of all the courts of these States and of the United States, as will be abundantly seen in the cases cited in *Barras* v. *Bidwell* (3 Wood, 5, 7), but it is, moreover, an express provision of our statutes. (See section 905 of the *Revised Statutes of the United States.*)

If we give the conclusiveness given by the court below, therefore, to this Canadian judgment, we give to it a conclusiveness which we uniformly and peremptorily deny to the judgments rendered in our own States whenever the law of the State rendering the judgment suffers, as the law of the Canadian court does, the judgment to be attacked on its merits.

Or take this consequence of the affirmance of the judgment below in the case at bar. Mr. Ritchie prosecutes, in the case now at bar, a defense to a creditor's bill, brought in the United States Circuit Court for the Northern District of Ohio, and a cross-bill, which, if successful, would completely destroy the present judgment against him, and make the defendants in error enormously his debtors. Suppose he should succeed in this defense and cross-bill, and should, in our court, obtain such a judgment, with it go to the Provence of Ontario, and on it bring suit. Then, as we have seen, under the law as settled in *Abouloff* v. *Oppenheimer* (*supra*), his judgment could, for lack of merit, be there completely overthrown

and a new trial awarded to his adversaries. Whereas, on the other hand, the present judgment against him, in the Canadian court, is, by our courts, held to be absolutely conclusive, and he is denied the right here to make, against the Canadian judgment, that very defense which the English and Canadian law gives to his adversaries the right to set up in the Canadian courts against Ritchie's judgment obtained on his cross-bill in our courts. We, in another connection, again come more fully to this matter of reciprocal equality.

We confidently submit to this court, here and now, when it is called upon, for the first time in its history, to lay down for our people, and for all these States, and for the courts thereof, a general, permanent, uniform, and binding rule of international comity, touching the extra-territorial force, in our courts, of foreign judgments, that this court will not lay down a rule so unequal, unjust, and so degrading to our courts and to our country.

IV.

Hilton *vs.* Guyot.

The case of *Hilton* v. *Guyot* (42 Federal Reporter, 249) will, doubtless, be relied on by the defendants in error as discrediting, and impairing the force of, *Abouloff* v. *Oppenheimer*. This case of *Hilton* v. *Guyot* is on the present docket of this court, and the court will soon be called upon to pass upon the law of that case. It is neither proper nor necessary, nor within our inclination, to attempt a general comment upon that opinion, or to discuss the law as applicable to that case. But, because of some supposed bearing of the decision in that case of *Hilton* v. *Guyot* upon our present case, we are *entitled* to make some suggestions as to the inapplicability of the criticism of the English court, by Justice Wallace, to our case.

Our first suggestion is, that to us it seems but just to say that the proposition of Justice Wallace, asserting, in substance, that the Chief Justice of England, and his unanimous associates, in the elaborate opinions delivered by them in said case of *Abouloff* v. *Oppenheimer*, show that they were ignorant of the state of the English law which they were considering and passing upon; and had misconceived or misstated the English decisions which they cite and review in their opinions, is a remarkable one. It is especially remarkable when we remember that these judges were of the very highest, most learned, and experienced within the British dominions; that they sat in a court of appeals, next in dignity and authority to the House of Lords; that the case was most ably and exhaustively argued in the light of all the authorities, by counsel of pre-eminent learning and ability, *and argued upon this very present point whether frauds committed by the successful party in the obtaining of the judgment, by imposing upon the court a claim which such successful party knew had no foundation in truth, could be set up as a defense to an action on that judgment;* that this same question had been, for a century, more or less, discussed and adjudicated upon in all the highest courts of England; that these cases were fully presented to and considered by the court.

All we care to say regarding this criticism of the English judges is that it can not have, in this court, any other weight than it may get from a review of the English cases which Justice Wallace alleges that the Chief Justice of England and his associates misconstrued.

But the thing that we especially desire to impress upon our argument, in regard to this criticism by Justice Wallace of the case of *Abouloff* v. *Oppenheimer*, is this:

1. That, although the criticism might be just and have weight in impairing the force of that decision, as tending to fix the state of the public law *generally, and as to all*

nations, yet it can not have any force whatever in impairing the force of this decision as establishing the *state of the law of England and its provinces* regarding the conclusiveness, or the want thereof, of foreign judgments in the courts of England and her provinces. This adjudication, in *Abouloff* v. *Oppenheimer*, was made in England by the Chief Justice thereof and his associates, in 1882, in the Court of Appeals, and is the latest adjudication upon that subject. Its authority has never, within the British dominions, so far as we can find, been questioned; but, on the contrary, has been recognized as establishing the law for the courts of England and her provinces.

We have seen from what we have quoted from 36, 37, and other sections of Story and on Conflict of Laws, and from the opinion by Chief Justice Taney, in *Bank of Augusta* v. *Earl* (13 Pet., 589), that the matter as to what kinds, extents, and degrees of comity shall be extended, in the absence of positive law, to other nations touching the enforcement of foreign judgments and laws in the courts of each nation, respectively, is a matter *purely voluntary* on the part of each nation—that each nation *settles for itself*, by the holdings of its courts, what that comity shall be, and decides this *in the interests of its own people.*

Therefore, whether the decision in *Abouloff* v. *Oppenheimer* be right or wrong, in the light of the public law of the world as a whole, or whether it be right or wrong, in the light even of bygone decisions in England, still the acceptance and enforcement of the rule of comity established by this case of *Abouloff* v. *Oppenheimer* by the English courts and provinces and their people *has made it to be, and it is, both as a fact and law, the present state of the English law upon that subject.*

This being undeniably so, it results that whatever may be the measure of comity and reciprocity due, in our courts, to other nations than Great Britain and her provinces, no greater measure of force can be given in our

courts to the judgments of *English courts and the courts of her provinces*, than these last-named courts accord to our judgments. It is, therefore, totally immaterial whether the views of Justice Wallace regarding the accuracy of the decision in *Abouloff* v. *Oppenheimer*, viewed in the light of the law administered by other nations, are right or wrong. The FACT remains that the state of the English law and the law of Canada is that which is announced and recognized in said case of *Abouloff* v. *Oppenheimer*, and in the case of *Paisley* v. *Broddy* (*supra*).

The Throckmorton Case.

2. Another suggestion which we desire to most carefully impress upon our argument, having relation to this opinion of Justice Wallace in the case of *Hilton* v. *Guyot*, is this:

Whatever force or accuracy may be in the use which the justice makes of the case of the *United States* v. *Throckmorton* (98 U. S., 61) in discrediting the decision in *Abouloff* v. *Oppenheimer*, or in support of the conclusion reached in *Hilton* v. *Guyot*, that decision, in *United States* v. *Throckmorton*, can have no application to the case at bar, provided that the averments of Ritchie's answer, as to no hearing, no evidence, his absence from the court, no consideration for the judgment, &c., &c., are well pleaded, and are admitted by the demurrer.

The substance of this answer of plaintiff in error, is in the averments of facts showing that when the defendants in error procured a judge to render the judgment against him they knew that their claim was wholly fraudulent and unjust; that they procured this without any evidence or hearing whatever, either adversary or *ex parte;* that they did this in the absence of Ritchie and his counsel; that there was no hearing whatever; that no evidence was produced, although a

clear and most vehement *issue of fact* was presented by the record for trial on evidence; that judgment was entered up against defendant for $238,000, for which not a farthing of consideration was ever given or tendered.

Now, how evident it is that, to such a judgment as this, so reached, in the absence of all hearing and trial, or even travesty thereof, the conclusiveness accorded, by the Throckmorton case, to judgments domestic regularly reached and rendered can have no possible application. This has been expressly decided by this court, again and again, since the rendition of the Throckmorton decision.

In *United States* v. *Minor* (114 U. S., 224, 241, *et seq.*), the court held that the law of the Throckmorton case had no application to the final decisions reached in the General Land Office in deciding to issue a patent where there had been no adversary hearing and trial.

So in the case of *Moffat* v. *United States* (112 U. S., 24, 32), and where there had been an adversary trial, this court refused to apply to a case where the jurisdiction of the land office authorities had been imposed upon by fraud, which consisted in the procuring of the issue of a patent at the land office by means of false documents which purported to show official proceedings and acts, by subordinate officers, which were fictitious, this because such procurement was a fraud upon the jurisdiction of the land office, and not a mere presentation of doubtful and disputed testimony, and that such a case is distinguished from the case of *United States* v. *Throckmorton*.

By what we have just gone over, in the light of the law as laid down in the case of *Abouloff* v. *Oppenheimer*, we have seen that the English courts have taken a stand upon the high ground that the English courts will not, under any notions of international comity or courtesy, make themselves parties to a gross fraud, involved in procuring a judgment flagrantly unjust, and violative of natural justice, by enforcing, in their courts, a judgment procured by a fraudulent plaintiff, to be rendered with-

out any consideration whatever to support it, and where such plaintiff had *knowingly and fraudulently* deceived and imposed upon the foreign court in obtaining the judgment, even though such fraud was an "intrinsic" one within the sense of this word "intrinsic," as used in the case of Throckmorton.

And we have seen, moreover, that, under the law of comity and reciprocity, on which alone this enforcement of foreign judgments rests, one nation will not extend such courtesy to another nation which denies that courtesy to other nations.

We have thus seen that the rule laid down in the Throckmorton case, that not "intrinsic" but only "extrinsic" frauds can be relied on to overthrow a judgment rendered in pursuance of existing jurisdiction, has no application to the case at bar, *if we apply to the English and Canadian courts the rule which they apply to us, as we must do.*

But by what we have seen taken from the cases of *United States* v. *Minor* and *Moffat* v. *United States* (*supra*), as well as from the face of the Throckmorton opinion (98 U. S., 66), it is plain that the conclusiveness asserted by the Throckmorton case has no application to the case at bar, for the reason that, in the case at bar, there was, in the Canadian court which rendered the judgment sued on (here adopting the words of the court, from page 66, 98 U. S.), "*no real contest in the trial or hearing of the case.*"

Here we leave the body of our argument, adding, however, a single additional point:

V.

Answer Below Presented a Defense Permissible at Law.

It has been contended that the defense which plaintiff in error interposed in the court below to the action on the Canadian judgment was one that could only be made available in equity, by cross-bill or otherwise—that it could not be presented as a defense to the action at law on the Canadian judgment.

This position, we submit, is not sound. In the case of *Ochsenbein* v. *Papelier* (Law Reports, 8 Chy. App. Cas., 695), decided in 1872, in the Chancery Court of Appeals, composed of Lord Chancellor Selborne and Lord Romelly, Master of the Rolls, and others, the syllabus of the case is in the following words:

"A plea of fraud is a good defense to an action on a foreign judgment; and, therefore, the Court of Chancery will not, on the ground that such judgment was obtained by fraud, interfere with the action at law.

"In cases of concurrent jurisdiction, proceedings at law will not be interfered with by the Court of Chancery, unless that court can give a more perfect remedy, or the case can be better tried by the procedure of that court."

The opinion of the Lord Chancellor in that case contains a rather full discussion of the matter covered by the syllabus and a citation of the authorities. The authorities he cites are *Hoare* v. *Bemridge* (14 Law Reports Equity, 522); Law Reports, 8 Chy., 22.

The Lord Chancellor also cites *Buller's Nisi Prius*, 244 a; *Story's Conflict of Laws*, secs. 607, 608; *Pearce* v. *Dewhurst*, 8 Sim., 279; *2 Smith's Leading Cases*, 752; *Bank of Australasia* v. *Nias*, 16 Q. B., 717, 735; *Goddard* v. *Grey*, L. R., 16 Q. B., 139, 149. Sir G. Mellish, L. J., also delivered an opinion in the case, agreeing with the opinion of the Lord Chancellor.

The same thing is, in legal effect, decided by this court in the case of *George* v. *Tate* (102 U. S., 564, 570, *et seq.*).

The answer in the court below, interposed by the plaintiff in error, was directed to the overthrow of the instrument—judgment—contract of record—cause of action—upon which the suit was brought. It sought to show that said cause of action was procured by fraud. This court held, in said case of *George* v. *Tate* (*supra*), that it was well settled that in such cases the plea alleging fraud in procuring the instrument was permissible in an action at law, and might be proved.

In the case of *Hartshorn* v. *Day* (19 How., 211, 223) the court holds what is expressed in the opinion of Nelson, J., in these words:

"Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misled, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal."

Citing—

2 J. R., 277; 13 Ib., 430; 5 Cow., 506; 4 Wend., 471; 6 Munf., 358; 2 Rand., 426; 10 S. & R., 25; 14 Ib., 208; 1 Alabama, 100; 7 Mo., 426; 4 Dev. & Bat., 432.

In section 591, page 1019, of *Freeman on Judgments* (4th ed.), the author says:

"A plea of fraud is a good defense to an action at law on a foreign judgment, and a court of equity will not interfere with the action at law, but will leave the defendant to make his defense there."

Citing—

Ochsenbein v. *Papelier*, L. R., 8 Chy., 695, *supra*;
21 Week. Reports, 516;
28 L. T. & S., 58, 459.

In now leaving the case, and begging for it that care-

ful consideration, by the court, which we are certain it will receive, we feel that it is due to ourselves to say that the length of our argument is due, in a large degree, to the confused condition of the authorities to which we have pointed, as to some of the features of this case, and the absence of controlling decisions, from this court, covering the supremely important questions which the case involves. For the reasons herein set forth we ask that the judgment below be reversed.

SAMUEL SHELLABARGER,
J. M. WILSON,
For Plaintiff in Error.

WASHINGTON, D. C.,
October 27, 1893.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

No. 81.

SAMUEL J. RITCHIE, PLAINTIFF IN ERROR,

vs.

JAMES B. McMULLEN AND GEORGE W. McMULLEN,
DEFENDANTS IN ERROR.

It is, we think, not inappropriate for us, at the opening of this additional brief, in the above-entitled case, and which the Court has given us permission to file, to state in a sentence or two why we have desired the opportunity to present this additional statement of our case.

After our above-entitled case was fully presented to this Court on printed and oral arguments, on behalf of each party, the Court heard full oral arguments and received full and exhaustive briefs in the cases of *Henry Hilton* v. *Gustav Bertin Guyot, as official liquidator*, Nos. 223 and 440 on the docket of the Court.

In each of these cases, to wit, No. 81 and No. 223 and 440, the action below in the circuit court of the United States was upon a foreign judgment. In case No. 81 the foreign judgment was rendered by the High Court of Justice, Queen's Bench division, for the Province of Ontario,

Canada, and in cases No. 223 and 440 the judgment was by the court of appeals of Paris, France. In each case alike the controlling question was, What degree of conclusiveness is, by the American courts, accorded to foreign judgments in cases where the defendant is not a resident or citizen of the country where the judgment is rendered and owes no allegiance to that government and where the judgment debtor has appeared and sought to make defence to the action?

This Court, in said cases No. 223 and 440, after the same were so fully argued and submitted, ordered them to be set down for rehearing before a full bench, but omitted to order such a rehearing in case No. 81, although the three cases are identical in the respects just stated, and although each had been argued before a bench that was not full. It was, in part, because of this difference in the action of this Court regarding these cases, respectively, that we were led to fear that the Court saw some material difference between the Hilton cases and ours, and which induced the Court to ask for a reargument in one and not in the other, and also because we hoped by this reargument to be able to add to our former argument some considerations going to show that case No. 81 is to be distinguished, in regard to voluntary appearance, in no material respect from cases No. 223 and 440, and that in case No. 81 the judgment of the foreign court is not, in the trial in the United States court, conclusive of the merits.

Since this case No. 81 was argued and submitted, there has been brought to our attention, more prominently than before that argument, an attempt to distinguish, to the disadvantage of our client, this case No. 81 from said cases No. 223 and 440, mainly in that, in cases No. 223 and 440, the appearance of the defendant in the foreign court will not be deemed a voluntary appearance, rendering the judgment of the foreign court conclusive, because such appearance was made in order to rescue the property of the defendant in France from seizure and sale; whereas no such fact, divest-

ing the defendant's appearance in the Canadian court in case No. 81 of its character of a voluntary appearance, existed. It is almost entirely because of our desire to add some suggestions in regard to this *alleged* distinction that we have asked for leave to file this additional statement of our case.

In reviewing the whole case we confess that we see but little, aside from this matter of voluntary appearance, that it is possible for us to add to what is found in the briefs of Mr. Hilton's counsel and in our former brief, and in the authorities there cited. We shall, therefore, not here attempt to enter upon a reargument of the case at large, but will content ourselves with submitting, without elaboration, some suggestions and authorities that are not fully covered by the opening brief. We will confine ourselves in the main to a statement of our additional points, in the shape of propositions, without entering into any considerable argument in support of them. We state our first proposition as follows:

I.

The Legal Predicament of Ritchie's Property in Canada.

Although the courts of the United States and this Court do not take judicial notice of the statutes of a foreign country (*Steam Co.* v. *Insurance Co.*, 129 U. S., 397, 444–447) unless they are public laws, of common concern to all nations, and have been promulgated by the joint act of the legislative and executive departments of our Government (*Talbott* v. *Seeman*, 1 Cranch, 1), nevertheless the courts of the United States will and do, in disposing of questions depending in whole or in part upon the state of foreign laws, *assume and presume* that all the other States of Christendom, as well as our own Government, recognize and enforce, as

part of their municipal law, the obligations arising out of the law of nations and of the principles of universal and natural justice which form parts and principles of our own law and government.

Amongst these classes of principles of municipal and international law which the courts of this country will assume to be the same, in the foreign country in question, nothing to the contrary appearing in the record, as prevail in our own country, are, for example, the principles and rules of the law merchant—the principle that governments have control of all property located within their civil jurisdiction—and the principle that breach of contract, battery, conversion, damages caused by fraud or negligence, and the like, give rights of action in such foreign States.

This principle is stated in *Whitford* v. *Panama Railroad Co.* (23 N. Y., 467–468), in the opinion by Denio, J.

It is repeated in—

McDonald v. *Mallory*, 77 N. Y., 551.
Leonard v. *Columbia Steam Nav. Co.*, 84 *id.*, 48–54.
Smith v. *Bull*, 17 Wendell, 323.
Story's Conflict of Laws, *Note a*, p. 864, 8th edition.

It is upon this principle that our courts will assume, in disposing of the question whether the appearance of the plaintiff in error in the Canadian court was voluntary or not, that the law of Ontario was such at the date of said suit against the plaintiff in error that, whether he appeared to defend said case or not, any property of his, real or personal, which was situate within the jurisdiction of the court was liable to be seized and subjected to any judgment rendered against the defendant in that case.

II.

By Law of Nations Canada Could Sequester all Property within Her Jurisdiction.

But, aside from this principle of legal and universal "presumption" which prevails in all the courts of civilized States, it is to be remarked that that principle just stated—of the liability of property within a foreign jurisdiction to be subjected to the payment of the debts of the owner thereof, although he may owe no allegiance to the country where his property is, and may owe allegiance to and be a resident of a different country, and may not be served with process or notice, and may not appear in any proceeding in the courts of such foreign country instituted to establish an indebtedness and subject his property—is one of universal recognition and enforcement in all modern civilized States.

And this principle, which subjects property, real and personal, within the jurisdiction of any sovereign government, to the control and disposition, through the courts of such government, of the laws of such foreign country, without regard to where the owner of the property may reside and without regard to the matter of his being served in the case seeking to subject his property, is a fundamental and universal principle of international law. And of this principle of public law all courts take judicial notice.

In volume 12 of the American and English Encyclopædia of Law, at page 162, it is said:

"The law of nations, from its reciprocal nature and mutual benefit to all civilized nations, is universally recognized" (by being judicially noticed) "by their courts."

Citing—

Vattel's Law of Nations, note 1.

The Scotia, 14 Wall., 170, 188.

This doctrine is stated in section 5, chapter 2, of 1 Greenleaf's Evidence (13th edition), at page 7, in these words:

"In like manner the law of nations and the general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations."

Citing—

Ereskine v. *Murray*, 2 Lord Raymond, 1542.
Heinneccius ad Pand., 1, 22, *tit.* 3, sec. 119.
1 *Blackstone's Commentaries*, 75–'6, 85.
Edie v. *East India Co.*, 2 Burr, 1226.
Chandler v. *Grieves*, 2 H. Bl., 606.
Rex v. *Sutton*, 4 M. & S., 542.
6 *Vin. Abr.*, *tit.* Court, D.
1 *Rol. Abr.*, 526 D.

If, therefore, the principle in question, namely, that the property, whether real or personal, within the jurisdiction of a nation is subject to the laws thereof and to the decrees and processes of the courts of such nation—this without regard to the allegiance and place of residence of, or service of process on, the owner of the property—is a principle of the law of nations, then this Court is bound to take judicial notice of that quality of the law of nations.

That such dominion over property within a government is a fundamental principle of the law of nations is beyond all possible question.

This is stated at page 768 of Story's Conflict of Laws (8th edition) in the following words:

"A nation within whose territory any personal property is actually situate *has as entire dominion over it*, while therein, in point of sovereignty and jurisdiction, as it has over municipal property situate there. It may regulate its transfer *and subject it to process and execution* and provide for and control the uses and dispositions of it, to the same extent that it may exert its authority over municipal property. *One of the grounds upon which, as we have seen,*

jurisdiction is assumed over non-residents is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty."

In note 2, page 502, of 3 American and English Encyclopædia of Law is the following:

"In discussing this question Foelix lays down the broad principle that 'every State possesses the power of regulating the conditions on which the real *or personal* property within its territory may be held or transmitted, and of determining the state and capacity of all persons therein, as well as the validity of contracts and other acts which arise there, and the rights and obligations which result from them, *and, finally, of prescribing the conditions on which suits at law may be commenced and carried on in its territory;*' also, '*that no State can by its laws directly affect, bind, or regulate property beyond its territory or control persons who do not reside within it, whether they be native-born subjects or not.*' *See Foelix Droit Intern. Privé, sec.* 9."

In 3 American and English Encyclopædia of Law, at page 502, in the text, this principle is stated in these words:

"Every nation possesses exclusive sovereignty and jurisdiction within its own territory; and the laws of every State affect and bind directly all property, whether personal or real" (*citing Steele* v. *Goodwin, Penna.*, 4 *Cent. Rep.*, 661; *Milne* v. *Moreton*, 6 *Binney*, 361; *Green* v. *Van Bushkirk*, 7 *Wall.*, 161; *Warner's App.*, 13 *Weekly Notes of Cases*, 505) "within its territory, whether belonging to citizens or aliens, and all persons residing therein, whether native-born subjects or alien sojourners, as well as all contracts made and acts done within the territory of such State or sovereiguty" (*citing Lawrence's Wheaton*, 160, 161; *Henry For. Law, pt.* 1, *ch.* 1, *sec.* 1; *Huberus, Lib.* 1, *tit.* 3, *sec.* 2; *Minor* v. *Cardwell*, 37 *Mo.*, 354; *Campbell* v. *Hall, Cowp.*, 208; *Davis* v. *Jarquin*, 5 *Harr. & J.*, 100; *Ruding* v. *Smith*, 2 *Hagg. Con.*, 383; *Hunter* v. *Potts*, 4 *T. R.*, 182; *Phillips* v. *Hunter*, 2 *H. Black.*, 402; *Sill* v. *Worswick*, 1 *id.*, 672, 690). "Sovereignty, united with domain, establishes the exclusive jurisdiction of a na-

tion within its own territories as to all *controversies*, crimes, and *rights* arising therein" (*citing Vattel, B. 2, ch. 7, secs.* 84, 85).

Amongst the cases from this Court illustrating and enforcing this doctrine are—

Green v. *Van Bushkirk*, 7 Wall., 132, 150.
Hervey v. *R. I. Locomotive* Works, 93 *U. S.* 664, 671.
Galpin v. *Page*, 18 Wallace, 366 *et seq.*
Schooner Exchange v. *McFaddon*, 7 Cranch, 116.

A somewhat striking application of this rule, that makes private property within a foreign jurisdiction subject to its laws, without regard to the place where the owner of the property may reside or be served with process, is in the case of the *Canada Southern Railway* v. *Gebhart* (109 U. S., 527). There this Court held that, as to all matters within its authority, the Dominion Parliament of Canada has plenary legislative powers as large and of the same character as those of the imperial government; that a corporation within the jurisdiction of said Dominion could receive from the parliament power to make arrangements with mortgage creditors for the substitution of a new security in place of one held by such creditors, and to provide that the arrangement *made under such statute* should be binding on all holders of obligations secured by the mortgage when the arrangement should receive the assent of a majority of the bondholders, and that this arrangement could be made although it violated the contract under which the bondholders took said securities; this because in the Dominion there was no constitutional prohibition against laws impairing the obligations of contracts.

III.

Omission of Ritchie to Appear Would not Affect Jurisdiction.

It results from these principles of the public law, of which this Court takes judicial notice, that any property which the plaintiff in error may have had, at the date of said suit in Canada against him, within the Dominion of Canada could have been subjected to the process of attachment, sale, and the like, provided the property was within the reach and control of the court, although the plaintiff in error was not within the Dominion, owed no allegiance thereto, received no notice of the proceeding against his property, and entered no appearance in the said case.

The omission, therefore, of plaintiff in error to appear and defend in said case was to him of not the slightest avail in the way of rescuing any property of his thereafter coming or then being within the jurisdiction of the Canadian court, or preventing it from being subjected to sale and sacrifice for the satisfaction of any judgment rendered against him.

IV.

Ritchie had Property within Jurisdiction of said Canadian Court.

And this brings us to the question whether it appears by this record that plaintiff in error had, within the jurisdiction of said Canadian court, any property liable to be subjected to sale for the payment of any debt found by the court against him.

The answer to this question is furnished by the record and is conclusive. The contract upon which the suit against the plaintiff in error was brought in said Canadian

court is set forth in the Record at pages 11 and 12. It will be seen at page 11, folio 20, that it contains this provision, amongst others:

"It is hereby agreed between the parties hereto that *the delivery of said bonds and coupons by the parties of the first part*" (*the McMullens*) "*and the payment of the above sum of two hundred and ten thousand dollars and the delivery of said copper stock by the party of the second part*" (*Ritchie*) "*shall be made to the Bank of Montreal at their agency at Picton, Ontario, at the date aforesaid, and such delivery and payment shall be a completion of the terms of this contract by the parties hereto.*"

It will be seen at page 5, folio 9 of the Record, that the amended petition of the plaintiffs, in the Canadian court, averred that on the 13th of January, 1886, they were the owners of 210 of the first-mortgage bonds, of $1,000 each, of the Central Ontario railway, and of coupons of said bonds amounting to $71,250, and which bonds and coupons, by an agreement dated January 13, 1886, they agreed to *sell to the plaintiff in error*, Ritchie, and that *Ritchie agreed to purchase them from the said plaintiffs*, the McMullens, for the price or sum of $210,000 of *the fully paid-up stock of the Canada Copper Company*, a company duly incorporated under the laws of Ohio.

The result of these features of the case, in the Canadian court, is that it places within the jurisdiction of the court, at the agency of the Bank of Montreal, at Picton, Ontario, the $210,000 of the first-mortgage bonds of the Central Ontario railway and the $71,250 of coupons of said bonds which were sold by the defendants in error to the plaintiff in error, *and it likewise places in the custody of said bank the* $210,000 *of fully paid-up stock of the Canada Copper Company which was to pay for said bonds* (as averred at the top of page 6 of the Record) *of the Central Ontario railway.* So that all of the property to be exchanged by this barter was thus, in contemplation of law, placed in the custody of said Bank of Montreal and was within the jurisdiction of the court.

Or if the bonds and coupons are not treated as Ritchie's, then the copper stock was his and was also within the jurisdiction of said court.

V.

Case in Canada was an Equitable Attachment of Ritchie's Property.

It must be further carefully observed that this case, in the Canadian court, was in the nature of a proceeding *in rem*, although not technically such (*Massie* v. *Watts*, 6 Cranch, 148, 156; *Hart* v. *Sansom*, 110 U. S., 154, '5; *Horton* v. *Smith*, 18 How., 263; *Van Dever* v. *Freeman*, 20 Texas, 334), or, more properly speaking, it was what the authorities often call "*an equitable foreign attachment.*"

In 1 Pomeroy's Equity, pages 203, '4, section 280, the author, in enumerating the classes of cases in which the jurisdiction of courts of equity is not restrained or affected by statutory enactments looking to the same general ends or remedies, includes equitable attachments as belonging to this class. He says:

"A statute authorizing a garnishment or attachment by proceeding at law *does not take away nor abridge the equity jurisdiction to enforce an equitable attachment or sequestration by statute under the same circumstances.*"

Citing—

King v. *Payan*, 18 Ark., 583–'7.
Payne v. *Ballard*, 23 Miss., 88–90.

The petition in the Canadian court prayed that said agreement of barter of bonds for copper stock may be *specifically performed, or that plaintiffs may have damages for the breach of said contract; that all proper directions may be given and proceedings had, and that they may have such other and further relief as the nature of the case may require.* It was, therefore,

strictly and literally a proceeding to recover from the plaintiff in error the said copper stock; or, in the event of failure to do that, then to have judgment entered against him for the damages resulting from said failure to pay for the bonds as stipulated by said contract, and to have such other relief as is obtainable in equity, including, of course, the sale of the said bonds and coupons sold to the defendant, Ritchie, in satisfaction of said damages.

It results, therefore, viewing the whole case as it existed in the Canadian court, that the proceeding was primarily and, in the first instance, to get from plaintiff in error, Ritchie, a specific performance of his contract by his delivering at said bank the copper stock that was to be paid to the defendants in error, the McMullens, for said bonds and coupons of the Central Ontario railway, and thus far the case was in the nature of a proceeding *in rem* to transfer to defendants in error the said copper stock and to plaintiff in error said bonds and coupons.

Failing in this main object of the petition, and resorting to the alternative prayed for, the suit was for damages in money, but treating the bonds agreed to be delivered by the McMullens as Ritchie's purchased property, still in the custody of the bank and subject to the jurisdiction of the court, such bonds being paid for by Ritchie by the damages assessed against him, and in legal effect asking the court that these bonds might be sold for the payment of said damages. (R., bot. p. 6.)

VI.

Said Alternative Relief Competent in the Case.

That such alternative prayer for all proper directions to be given and proceedings had was one under which an order for the sale of Ritchie's bonds, so sold to him and so agreed to be delivered by the McMullens at the said agency of the Bank of Montreal, and paid for by said assessment of

damages, was a legitimate prayer which the court, under the facts averred in the petition for specific performance, could and was bound to grant, is most familiar law.

In the case of *Cathcart* v. *Robinson* (5 Pet., 264) the syllabus states this doctrine of equity thus:

"The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable. Such subjects are within the settled and common jurisdiction of the court. It is equally well settled that if the jurisdiction attaches, the court will go on to do complete justice, although in its progress it may decree on a matter which was cognizable at law."

The opinion in this case is by Chief Justice Marshall.

See this doctrine also in the case of *Andrews* v. *Brown* (3 Cushing, 130) and cases there cited in the opinion of Wilde, J.

This rule is stated in another authority, 22 American & English Encyclopedia of Law, 938, as follows:

"When equity has once obtained jurisdiction, it will determine all questions material to the accomplishment of complete justice between the parties."

Citing—

Central Trust Co. v. *Wabash, &c., R'y Co.*, 29 Fed. R., 557.
Cathcart v. *Robinson*, 5 Pet., 264.
Apperson v. *Cogin*, 3 Ills. App., 48.
King v. *Morford*, 1 N. J. Eq., 274.
Renken v. *Hill*, 49 Iowa, 270.
Iron Age Pub. Co. v. *Telegraph Co.*, 83 Ala., 498.
Anson v. *Townsend*, 73 Cal., 415.
Simon v. *Wildt*, 84 Ky., 157.
Ross v. *Purse*, 28 Pac. Rep., 473.

It is thus made demonstrably plain that the present record shows a case pending against the plaintiff in error, Ritchie, in a foreign court, where, according to the averments of the petition, his property was within the jurisdiction and con-

trol of the foreign court, and where, in the absence of an appearance and defense by him, his property (to wit, the $210,000 of bonds and the $71,250 of coupons purchased by him and in contemplation of the law paid for by the assessment of damages) would be subjected to the payment of said damages, which, according to his contention, he did not owe, and that his failure to appear did not in any degree deliver him and his property from this peril, but, on the contrary, only increased such peril.

VII.

Laws of Canada, Subjecting said Property, Increased the Peril of Plaintiff's Property.

It is proper to add, in this immediate connection, in determining upon the question whether the appearance of the plaintiff in error, Ritchie, in said case is deemed voluntary, so far as the question of voluntary appearance depends upon the peril in which his property was placed in said foreign suit, that the plaintiff in error must be accredited with all the danger that was POSSIBLE under the character and conditions of the case brought, including the state of the Canadian statutes.

And not only was his property under all the peril that arises out of the law of equitable attachments instituted in one government against the property within its jurisdiction of a citizen of another government, and of which this Court will take judicial notice, as we have above pointed out, but, in addition to that, Ritchie *knew* of the condition of the Dominion legislation and rules of judicial practice providing for just such cases against non-residents; and, in determining whether his appearance shall be treated as voluntary we think that, although this Court does not take judicial notice of foreign statutes not proved, yet it may take into view all of such conditions in which Ritchie was

placed, of which the courts do take judicial notice, including the taking of judicial notice of the ordinary intelligence of business men doing business in a foreign country, and will thus determine how much stress Ritchie was thus subjected to tending to render his said appearance not voluntary.

This foreign equitable attachment so prosecuted in the Canadian court against Ritchie, though maintainable, as we have seen, under general laws of which this court takes judicial notice, was in fact prosecuted under the rules of practice established by Canadian law which are expressed in rule 271, p. 37, of the "RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT OF JUDICATURE OF ONTARIO, REVISED, QUALIFIED, AND CONSOLIDATED UNDER THE AUTHORITY OF CHAPTER 8 OF THE ACTS PASSED IN THE 50TH YEAR OF THE REIGN OF HER MAJESTY QUEEN VICTORIA," and which rule 271 reads as follows:

"271. *Service out of the jurisdiction*, of a writ of summons, or notice of a writ of summons, or other document by which a matter or proceeding is commenced, may be allowed by the court, or a judge whenever (Eng. R. 1883, 64 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*)—

"(*a.*) The whole subject-matter of the action is land situate within Ontario (with or without rents or profits); or—

"(*b.*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Ontario, is sought to be construed, rectified, set aside, or enforced in the action (Ont. R., 45 (*a*), altered); or—

"(*c.*) Any relief is sought against any person domiciled or ordinarily resident within Ontario; or—

"(*d.*) The action is for the administration of the personal estate of any deceased person, who, at the time of his death, was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trust of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Ontario (new); or—

"(*e.*) The action is founded on any breach, or alleged breach, within Ontario, of any contract, wherever made,

which, according to the terms thereof, ought to be performed within Ontario (Ont. R., 45 (b)); or—

"(*f.*) Any injunction is sought as to anything to be done within Ontario, or any nuisance within Ontario is sought to be prevented or removed, whether damages are or are not also sought in respect thereof (Ont. R., 45 (*c*), (*d*)); or—

"(*g.*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. New."

See other legislation of Canada, to the same effect as this rule 271, cited by Justice Cooley in the case of *McEwan* vs. *Zimmer*, 38 Mich., 765.

What we have now gone over does, as we confidently submit, not only show that the proceeding in the Canadian court against Mr. Ritchie was aimed directly at the subjection of his property within the jurisdiction of the court to the payment of a debt (which, according to his contention, was absolutely fictitious and fraudulent), but it shows that such a proceeding in equity against property within the Dominion of Canada is one of which the courts will take judicial notice, because it is a quality which by the law of nations attaches to every modern civilized state. It also shows that said bonds and coupons were not only within the jurisdiction of the court, but were, in contemplation of the law, in the custody of the court because in the custody of its suitor, the complainants.

But, in addition to that, Ritchie also knew, and entered his appearance under the knowledge, that, by the said rules of practice established by law in the courts of Canada, he could be served with process in Ohio for the purpose of subjecting his said property to sequestration—and this *because the contract sued on was to be performed in Canada.*

If, therefore, an appearance by a non-resident defendant in an action against him in a foreign court is not voluntary, when that appearance is entered under the stress and danger of losing his property in such foreign country (of which he, in fact, there had what amounted to a million

dollars or more in addition to that shown by the record to to be there), then Ritchie's appearance in this Canadian court was not voluntary, and he stands, so far as the action in our courts is concerned, as if he had not entered his appearance.

VIII.

Restatement of Some of the Authorities Showing the Canadian Judgment not to be Conclusive in the Suit upon it in the Courts of the United States.

We now proceed to refer to a few of the cases which show that this Canadian judgment is not conclusive of the merits in our courts. This recapitulation will establish each one of the following propositions:

1. That the appearance of plaintiff in error, Ritchie, under the conditions in which he appeared in the Canadian court was not voluntary, and, therefore, the judgment against him cannot be made, as the foundation of an action in the courts of the United States, to be conclusive of the merits of the case.

2. That, even if Ritchie's appearance is to be treated as voluntary, yet, since the judgment against him was founded wholly and absolutely in fraud, known to the plaintiffs in the Canadian court to be such, and since a judgment so founded and obtained is at most no more than *prima facie* a good ground of action, either under the American or the English law, therefore the judgment against Ritchie in this case is not conclusive of the merits.

3. Since foreign laws and foreign judgments *have no force or vigor outside of their own country*, and our courts are not required or permitted, by comity or otherwise, to accord to such foreign laws and judgments any force which is incon-

sistent with the *rights and interests* of our own people, and since the present state of the English law, including the law of Ontario, is as stated in the case of *Abouloff* v. *Oppenheimer* (L. R. 10, Q. B. D., 295), and the cases which follow it, that "a foreign judgment, obtained by the fraud of a party to the suit in the foreign court, cannot be afterwards enforced by him in an action brought in an English court, even although the question whether the fraud had been perpetrated was investigated in the foreign court, and it was there decided that the fraud had not been committed" (see first paragraph of the syllabus in said case of *Abouloff* v. *Oppenheimer*), therefore this Court will not give to a Canadian judgment a conclusiveness which the Canadian courts deny to the judgments of this and of other American courts.

Below is our recapitulation going to the establishment of the foregoing propositions:

In giving this condensed reference to some of the authorities, it is not our intention to do more than to point to some of the most conspicuous and pertinent cases and which we deem conclusive of the case at bar. In view of the most exhaustive presentation of cases bearing upon the matter of the conclusiveness of foreign judgments in our courts, which is found in the two briefs for Mr. Hilton in cases Nos. 223 and 440, and in our opening brief, it is not only unnecessary but improper to trouble the Court with a repetition of the great body of authorities presented in these briefs.

We content ourselves by alluding to some cases bearing upon the question whether the appearance of plaintiff in error, Ritchie, under the conditions to which we have above pointed, is to be deemed voluntary in such sense as to make the judgment rendered in the Canadian court conclusive of the merits of the case when sued on in a country foreign to the country in which the judgment was rendered, but they also bear quite conclusively upon the entire case at bar.

IX.

What is a Voluntary Appearance?

It is thoroughly settled that an act done, such as the payment of money, as the means by which to free the property of the party so acting from an unjust attachment or seizure thereof, is not voluntary, and the money so extorted may be recovered back.

In the case of *Chandler* v. *Sanger* (114 Mass., 364), opinion by Gray, J., the court decided what is thus expressed in the head-note:

"A payment by a person to free his goods from an attachment, put on for the purpose of extorting money by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back in an action for money had and received without proof of the termination of the suit in which the attachment was made."

In this case in Canada, as we have seen in our opening brief (see "Recapitulation" on p. 50), the suit was manifestly one which the plaintiffs therein knew had no merits and was fraudulently prosecuted as a means of extortion.

The same thing as that decided in *Chandler* v. *Sanger* (*supra*) is found in—

Spades v. *Barrett*, 57 Illinois, 289.
Nicodemas v. *East Saginaw*, 25 Michigan, 456.
Adams v. *Rives*, 68 North Carolina, 134.

To the same effect see—

Radich v. *Hutchins*, 95 U. S., 210, and cases cited, p. 213.
Shultz v. *Culbertson*, 29 Wisconsin.
Heckman v. *Schwartz*, 50 *id.*, 267.

If such degree of coercion, as is shown in these cases, is sufficient, in a *home* court, to render an act of payment involun-

tary, then, *a fortiori*, an appearance entered in a foreign court as the only step offering hope of delivery of the property seized, in such foreign country, from sequestration and total loss is *not* such a voluntary appearance as will enable the judgment obtained under a jurisdiction so acquired, not only to sequester the property *in the foreign jurisdiction*, but also to be used as giving a *conclusive right to a judgment in our courts, subjecting to sacrifice all the other property of our citizen.*

What we have just stated is true, not only according to the dictates of reason and of common justice, but is also true under express authority of the highest order. There is not in existence, so far as we have been able to find, a single case which holds that such an appearance, entered in a foreign court under such conditions, in order to rescue property oppressively seized in the foreign jurisdiction, is voluntary in such way and sense as to make the judgments rendered on such an appearance, and for such purposes, conclusive, for the purpose of subjecting not only the property within the jurisdiction of the foreign court, and so seized, to sequestration, but also to make that judgment furnish a conclusive right to a judgment in other countries, subjecting all the other property of the party so appearing to seizure and sale.

On the contrary of this, the cases are the other way. Take, for example, the case of *General Steam Navigation Co.* v. *Guillon* (11 Meeson & Welsby, 877). In that case the owners of a French vessel, navigating the English channel, sued the owners of an English vessel in a court at Havre, France, for damages done to their French vessel by reason of a collision that had occurred, as they alleged, through the fault of the English. The English defendants *appeared and defended in the suit at Havre*, and a judgment was rendered against them.

These owners of the English vessel afterwards sued the owners of the French vessel *in England* for damages on account of the *same collision*, charging that it had occurred

through the fault of the French. The French defendants, in the suit by the English owners in the English court, pleaded in defense the Havre judgment. They set up several pleas, but the English court held that the plea relying on the conclusiveness of the judgment at Havre was "*bad in substance,*" *because not stating that the plaintiffs were French subjects or residents, or were even present in France when the suit there was commenced, so as to be bound, by reason of allegiance, domicile, or temporary presence, by the decision of the French court.*

This, then, is a decision by the court of exchequer of England, in this comparatively recent and leading case, holding that the fact of appearance does not so prejudice the party appearing as that a judgment rendered against him in such case can be pleaded as an estoppel to the right of action accruing to English subjects by reason of alleged negligence in the same transaction so adjudicated and decided in favor of the French owners in the court at Havre.

Again: In the case of *Schibsby* v. *Westenholz* (L. R., 6 Q. B., 155), Chief Justice Blackburn (p. 162), in speaking of the opinion of the court by Parke, B., Lord Abinger, Alderson, B., and Gurney, B., in this case of *General Steam Navigation Co.* v. *Guillon*, says:

"It will be seen from this" (quotation just made by the chief justice) "*that these very learned judges, besides expressing an opinion conformable to ours, express one to the effect that the plaintiffs in that suit did not put themselves under any obligations to pay the foreign judgment merely by appearing to defend against it.*"

But the chief justice adds afterwards that the question of the effect of such appearance he prefers to leave open for the present.

The case of *Voinet* v. *Barrett* (65 Law Journal (N. S.), Q. B., 39) was one where British subjects, having extensive business in France, were sued in a French court. They had

no property in France at the time, but were likely to have. In order to save such property from seizure they appeared in the French court. Judgment was rendered against them, and an action was brought on that judgment in England, and the defense was made in the action on the judgment that they (the defendants in the French court) did not voluntarily appear.

In the court below Wells, J., said that where the appearance was to protect property *actually served the appearance was not voluntary*, and that he could see no difference between that case and one where the object was to protect property which might thereafter be seized; but it was held, on other grounds, that the parties who had so appeared were not bound by the judgmdnt.

In the case of *Abouloff* v. *Oppenheimer* (L. R., 10 Q. B. D., 195), decided in 1882 and fully quoted from and commented on in our open brief at page 40 *et seq.*, there was in the Russian court an appearance by the defendant, and a full trial was had, and yet the English court held that such appearance did not render the foreign judgment conclusive in England. We need not further comment on this case already so fully pressed on the attention of the Court.

In the case of *Vadala* v. *Lawes* (L. R., 25 Q. B. D., 310), decided by the court of appeals of England in 1890, *there was a full appearance in the Italian court*, and yet in the suit in England on the Italian judgment such appearance was held not to render the judgment conclusive.

This last-named decision follows and sanctions the conclusions reached by the court in the case of *Abouloff* v. *Oppenheimer* (*supra*), and we have thought it would be convenient for us in this brief to copy substantially in full the opinion of the court in this case of *Vadala* v. *Lawes*—this because, as seems to us, it furnishes an antidote to the alleged disparagement of the force and soundness of the Oppenheimer decision, coming out of the criticism indulged in by other counsel, in regard to the absurdity of the reason-

ing of the chief justice of England in said case of *Abouloff* v. *Oppenheimer* in attempting to distinguish between the court being "mistaken" and being "misled."

The true reason why the courts of England and other civilized countries allow a new trial, on the merits, of the same facts that were tried in the foreign court in a case where the judgment of a foreign court was founded in wrong, fraud, or injustice, and do not allow it where (as laid down in the case of *United States* v. *Throckmorton*, 98 U. S., 61) the action is upon a domestic judgment or in other actions generally, is that a foreign judgment has no intrinsic force, authority, or obligation in other countries; but, on the contrary, the law, in this regard, is as stated in Lawrence's Wheaton on International Law (2d annotated edition), pages 292, 293, cited in our opening brief at page 36, in these words:

"And no sovereign is bound, unless by special compact, *to execute within his dominions a judgment rendered by the tribunals of another state, and if execution be sought by suit upon the judgment or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment and to give effect to it or not as may be found just and equitable.*"

It is for precisely this reason that no enlightened court is or ought to be under any obligation to enforce a foreign judgment without looking into the merits of the case on which it was rendered where such enforcement would be, as here expressed by Wheaton, "unjust and inequitable," and especially not when such enforcement would be to execute gross, known, and palpable fraud, or where it would be to deny our citizens those guarantees, protective of truth and justice, which are secured by our Constitution in the right to jury trial, and in the right to be tried according to the policies and practices, rules, and established laws of our own country, or where such enforcement of the foreign

judgment would be to import into our country laws and obligations at war with, or injurious to, our public and other institutions.

These are really the controlling reasons given by the English judges why the law of the case of Throckmorton is not applied to actions on foreign judgments. They are in effect the reasons given by the chief justice of England in the case of *Abouloff* v. *Oppenheimer*, where he says (p. 42 of our opening brief):

"It is enough for me to say that the English courts do enforce obligations created by foreign judgment, *but it has always been held in the courts of this country to be an answer to an action upon a judgment that the judgment was obtained by the fraud of the party seeking to enforce it.*"

Or, as stated in the opinion of Brett, L. J., in the same case (see p. 45 of our opening brief):

"This proposition" (that a judgment obtained in a foreign court by the successful fraud of the party obtaining it is not conclusive) "is absolutely without any limitation, and, as the learned chief justice has pointed out, is founded upon the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation.

* * * * * * *

"I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by fraud of the party relying upon it, it cannot be maintained in the courts of this county; and, further, that nothing ought to persuade an English court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign court."

Beyond all possible question or cavil, it is because of these reasons, here given, that the law of the Throckmorton case has no possible application to a suit on a foreign judg-

ment, which foreign judgment has no extraterritorial force whatever, as explained in what we have just quoted from Wheaton's International Law.

Therefore, in actions upon such judgments, our courts are bound, as expressed by Wheaton, to examine into the merits of the judgment, and to give it effect or not as may be found "just and equitable;" and for these same reasons to apply this law of the case of *Abouloff* v. *Oppenheimer*, authorizing a retrial of the merits, although such merits were tried in the foreign court, does not disturb, unsettle, or in any degree affect, the rules of law and decisions which prevail in this country under the doctrine of the Throckmorton case.

By what we have now gone over we have surely established, upon justice, principle, and authority, the proposition that Mr. Ritchie's appearance, under the conditions in which it was made, was not in the sense of the law "voluntary," so as to make the judgment in Canada against him to be conclusive by reason of a "voluntary appearance," and he stands therefore as if he had not appeared in the case.

This being established, it ends all question in regard to the foreign judgment being conclusive against Ritchie. It is in our courts and country not only not conclusive, but it is absolutely void, because no service was had upon him except the unauthorized and void service at Akron, Ohio.

Upon this point in the case of *Bishoff* v. *Wethered* (9 Wall., 812–'14) the head-note states what was decided as follows:

"A judgment recovered in the common pleas at Westminster, England, against a person in the United States, without any service of process upon him, or any notice of the suit other than a personal service on him in this country, has no validity here even of *prima facie* character."

In that case there were several counts. One count was on a judgment recovered in the court of common pleas at

Westminister Hall, England, to which the plea was entered *nul tiel record.* At the opening of the opinion by Justice Bradley he says:

"As to the first point raised—to wit, the effect of the proceeding in the common pleas at Westminster Hall—it is enough to say that it was wholly without jurisdiction of the person, and whatever validity it may have in England by virtue of statute law against the property of the defendant there situate, it can have no validity here even of *prima facie* character. It is simply null."

The same thing is held in the case of *McEwan* v. *Zimmer* (38 Mich., 768), where the opinion is by Justice Cooley. It is an elaborate opinion, examining many of the English cases cited in this court. Justice Cooley there says that he knows of no case, in the world, holding that process can run beyond the jurisdiction of the country from whence it is issued; and as to this he cites section 539 of Story's Conflict of Laws. He examines the English cases alleging that the rendition of a judgment in a foreign country *imposes a duty or obligation* upon the judgment debtor which the courts of other countries will recognize and enforce, and says that no duty arises in the absence of service of lawful process, and concludes by saying that the service of process of the Canadian court upon the defendant in Detroit was absolutely void.

We may as well, at this point as anywhere else, reply to the suggestion that the decisions of the colonies of Great Britain all hold to the conclusiveness of foreign judgments, by again calling attention to the case, cited in our opening brief at page 46, of *Paisley* v. *Broddy* (11 Practice Reports, Ontario, 202), decided in 1885 by Chief Justice Wilson. This case expressly recognizes the soundness of the decision in said case of *Abouloff* v. *Oppenheimer*, and that it is in force in Canada, but says that it has no application to a judgment rendered in one of the British colonies (in that case in the Province of Manitoba), but is a doctrine which is only

applicable to *foreign judgments, properly so called*, such as the one in question in the case of Abouloff and Oppenheimer.

We conclude this brief by here inserting the entire substance of the opinion of the court in the case of *Vadala* v. *Lawes* (L. R. 25, Q. B. D., 310), and we italicize the parts of this opinion to which we invite special attention. The opinion is as follows:

"I cannot fritter away that judgment" (*Abouloff* v. *Oppenheimer*), "and I cannot read the judgments without seeing that they amount to this: That the fraud upon the foreign court consists in the fact *that the plaintiff has induced that court by fraud to come to a wrong conclusion. You can reopen the whole case, even although you will have in this court to go into the very facts which were investigated and which were in issue in the foreign court.* The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court had been imposed upon.

"That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the court faced the difficulty that you could not give effect to the defense without retrying the merits. The fraud practiced on the court, or alleged to have been practiced on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated upon in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules to which I have alluded could be worked together, they said: '*Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to retry the merits, you are entitled to do so according to the law of this country.*'

"*I cannot read that case* (*Abouloff* v. *Oppenheimer*) *in any other way.* Lord Coleridge uses language which I do not think is capable of being misunderstood. In order to understand the judgment, it is well to look at the argument for the defense—an argument conducted by Mr. Benjamin

and Mr. Cohen, and an argument which I understand to have been accepted by the court: '*Even if the Russian courts had inquired into the existence of the fraud, and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court.*'

"Then Lord Coleridge says (at page 302): 'An ingenious attempt has been made to take this case out of the general proposition' (namely, that you can impugn a foreign judgment for fraud) 'and to call in aid another equally clear proposition, namely, that the courts of this country, in dealing with foreign judgments, will not inquire whether the foreign court pronounced a judgment correct in point of law or right and accurate in point of fact, and that, inasmuch as the defense now relied upon might have been, and perhaps was, brought before the foreign court, which decided against the allegation of fraud, the foreign court, in the words of De Grey, C. J., was mistaken and not misled.

"'The answer to that contention has been given in the course of the argument for the defendants. We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled never could have been submitted to them—never could have been in issue before them, and, therefore, never could have been decided by them. The English courts are not either retrying or even discussing any question which was or could have been submitted to the determination of the Russian courts.'

"The counsel for the plaintiffs have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule upon which they are relying—that you cannot retry the merits. To a technical objection it is a good technical answer to say, 'The substance is the same; that you do retry the merits (as I understand the judgment to mean) for the purpose of satisfying an English jury that the foreign court has been imposed upon, and that, if you cannot prove that the imposition was made without retrying the merits, you are at liberty to retry them.'

"I understand the decision to go that length. Baggallay, L. J. (at page 303), expresses the same idea. He says: 'If the judgment had not been improperly obtained, the right of the plaintiff would be clear. In using the words "im-

properly obtained" I desire to be understood as not limiting them to a case where a fraud has been perpetrated upon the foreign court itself. I apply them also to a case where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based.' *That is to say, not only where there has been a fraud on the court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence. That is such a fraud as would enable the defendant to impeach the foreign judgment.*

"The present master of the rolls says (at page 306): 'It is a very small matter to be considered whether these facts ought to have been alleged in the defense by the defendants or whether they ought to have been asserted in the reply by the plaintiff, and the question has been fully argued before us whether, if the plaintiff's fraud was asserted by the defendants at the trial in the Russian courts, and if evidence in proof of it was given by them, they are now debarred from relying upon the plaintiff's fraud as a defense to the present action. *I will assume that, in the suit in the Russian courts, the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence that they propose to adduce in this action. Nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defense are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action.*'

"Then, further on, he says: '*I accept the whole doctrine without any limitation, that whenever a foreign judgment has been obtained by fraud of the party relying upon it it cannot be maintained in the courts of this country; and, further, that nothing ought to persuade an English court to enforce a judgment against one party which has been obtained by fraud of the other party to the suit in the foreign court.*' That last passage can only be applicable to cases where there is what is called extrinsic fraud, such as imposition on the court itself; but when I come to look at the defendant's argument and the whole judgment, I cannot conceal from myself that it has been decided to the effect I have already mentioned, and

that, therefore, it is competent, in point of law, for the defendant in this action to raise this defense and to satisfy the jury, if he can, that the Italian court was misled by the fraud of the plaintiff, that fraud consisting in this: that the plaintiff knowingly placed before the Italian court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions.

"If the jury were to find, in fact, not only that the bills were for gambling transactions, but, further, that the Italian court has been imposed upon by the fraud, that is a good defense according to the case of *Abouloff* v. *Oppenheimer* (L. R., 10 Q. B. D., 295). It appears to me, therefore, impossible, in the face of that case, to depart from the views taken by the divisional court, and consequently this appeal must be dismissed.

"BOWEN, L. J: I am of the same opinion. Bill dismissed."

The syllabus of this case, which was decided in 1890, is in these words:

"Where an action is brought in England to enforce a foreign judgment, the defendant may raise the defense that the judgment was obtained by fraud of the plaintiff, even though the fraud alleged is such that it cannot be proved without retrying the questions adjudicated upon by the foreign court.

"*Abouloff* v. *Oppenheimer*, 10 Q. B. D., 295, discussed and followed."

The doctrine which our adversary demands that this Court shall fasten upon all the courts, upon all the people of this Union, and on all the States thereof is, as has been seen by the authorities now submitted for plaintiffs in error in the three cases now before you, a doctrine that is not tolerated by any single government in the world, not even by England. It is a doctrine which has never been tolerated in this country by the courts thereof, as is in substance confessed by our adversaries, except as it may have been tolerated by hesitating and contradictory holdings since the date of the *dicta* in the

case of *Lazier* v. *Westcott* (26 N. Y., 146) in 1862, and even since then, as is declared by high authority (3 American and English Encyclopedia of Law, 534), the "tendency" of American law has been against it.

It is a doctrine rejected by that enormous array of American authorities cited in the Notes of Cowan & Hill, pp. 185 and 186, and quoted in our opening brief, p. 25, and rejected in that other array of authorities cited in Wharton's Conflict of Laws as quoted at pp. 35 and 36 of our opening brief. It is a doctrine that is rejected by Mr. Phillips in the second volume of his work on Evidence, p. 157 (as quoted in our opening brief, p. 24), and explicitly condemned by Professor Wheaton in his work on International Law (pp. 292, 293, as quoted in our opening brief, p. 26).

It is condemned in the most explicit manner by Chancellor Kent in the second volume of his Commentaries, p. 120, as quoted in our opening brief (p. 27), and is condemned in his latest utterances in the case of *Taylor* v. *Bryden* (8 Johns., 176), quoted in opening brief, pp. 31, 32, where he says that "the general language of the books is that the defendant *must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured.* It is condemned by 1 Greenleaf's Evidence (13 ed.), section 547, as expressed in the quotation in our opening brief at p. 24.

It is disapproved by Justice Woodbury in the case of *Burnham* v *Webster* (1 Woodbury and Minot, 172, as quoted in our opening brief, pp. 30, 31), and it is, in substance and effect, disapproved by this Court in the case of *Christmas* v. *Russell* (5 Wall., 304, as quoted in our opening brief, p. 51), in the opinion of the Court by Clifford, J. It is also condemned in the case of *Bank of Augusta* v. *Earle* (13 Pet., 589, as quoted in our opening brief, p. 38), which declares that no comity is extended to the laws, judgments, &c., of other nations except as "the voluntary act of the nation by

no testimony whatever was offered to or hearing had by the court; and that the appearance of the plaintiff in error in the case was involuntary because resorted to as the only possible step giving any hope of rescuing his property then, in the clutches of the Canadian court, from unjust and oppressive sacrifice in fulfillment of the gigantic fraud in which the suit originated.

Surely we cannot be mistaken in thinking that the decree demanded of you by defendant in error is one not fit to be made.

S. SHELLABARGER,
J. M. WILSON,
For Plaintiff.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 15.

SAMUEL J. RITCHIE, PLAINTIFF IN ERROR,

vs.

JAMES B. McMULLEN AND GEORGE W. McMULLEN.

The following is the full report of the case named below of *Crozat vs. Brogden*, as it is found reported in "The Law Reports, under the superintendence and control of the Incorporated Council of Law Reporting for England and Wales, Queen's Bench division and probate division (including bankruptcy, divorce, admiralty, ecclesiastical, and railway and canal commission cases), 1894, vol. 11, Q. B.; 1894, P., part VI, June 1; 2 Q. B., p. 1 to p. 188; P., p. 189 to p. 220."

This case was not in existence when the above-entitled case of *Ritchie vs. McMullen* was argued and submitted to the Court, and we therefore ask leave of the Court now to submit the same in behalf of the plaintiff in error.

The report of said case of *Crozat vs. Brogden* is annexed below.

S. SHELLABARGER,
J. M. WILSON,
For Plaintiff in Error.

IN THE COURT OF APPEAL.

CROZAT
vs.
BROGDEN.

Practice—Security for costs—Plaintiff resident out of the jurisdiction—Action on foreign judgment.

Where a person resident out of the jurisdiction brings an action in this country, the fact that the action is brought on a foreign judgment, recovered in proceedings in which the defendant appeared, does not affect the right of the defendant to security for costs.

Appeal from an order in chambers requiring the plaintiff to give security for costs.

The defendant, who had purchased certain gas works situate in France, employed the plaintiff to resell the said gas works for him in consideration of a commission of one-third of the net profits of such resale. By the terms of the employment it was agreed that the plaintiff should not enter into a contract of sale which did not provide for the deposit by the proposed purchaser of the sum of 10,000 francs in cash. The gas works having been resold to Messrs. Georges & Co., the plaintiff brought an action against the defendant in the court of the tribunal civil of the Seine to recover a sum of 27,000 francs, which he claimed to be one-third of the net profits of such resale. The defendant appeared and defended the action upon the ground that the gas works were not sold through the agency of the plaintiff, and he also counterclaimed against the plaintiff for damages for having entered into a contract of sale of the said gas works to one Tarride (which contract was never carried out), and for having accepted in lieu of a deposit of 10,000 francs in cash a deposit of ten shares, of 1,000 francs nominal value each, in a certain company, and, further, for having allowed the deposit of such shares with a certain person who had no authority from the defendant to accept such deposit, whereby the same were lost to the defendant. The court

gave judgment for the plaintiff on the claim for a sum of 11,735 francs and as to the counter-claim held that the acceptance of the deposit of shares in lieu of cash was with the authority of the defendant, and that such shares had in fact been received by the defendant. The defendant appealed to the court of appeal in Paris, and the plaintiff also entered a cross-appeal on the ground that the court had estimated the one-third net profits at too low a figure. The appeals were heard, and the court of appeal dismissed the defendant's appeal and on the plaintiff's cross-appeal increased the amount of the judgment to 20,641 francs. Upon that judgment the plaintiff, who was a Frenchman resident in France, brought the present action in the high court in England. The defendant in his defense admitted the fact of the judgment, but alleged that it had been obtained by the plaintiff's fraud in misleading the court by false assertions that the gas works had been sold through the agency of the plaintiff, that the defendant had authorized the acceptance of the deposit of shares in lieu of cash under Tarride's contract, and that such shares had been received by the defendant, and also by suppressing certain letters, whereby the court of appeal were induced to overestimate the amount of the net profits of the resale. The defendant also counterclaimed for the 10,000 francs which he alleged he ought to have received under the contract with Tarride.

When the action was commenced the defendant obtained an order from the master at chambers that the plaintiff should give security for costs. The plaintiff applied for judgment under order XIV, which was refused by the master, and his order was confirmed by the judge at chambers, the divisional court, and the court of appeal. The defendant then applied that the security should be increased on the ground of the expense incurred in opposing the proceedings of the plaintiff to obtain judgment. The defendant obtained an order to increase the amount of the security by the sum of 80 pounds, and on appeal that order was affirmed by Grantham, J.

The plaintiff appealed.

1894, February 8.—*Crump, Q. C.*, and *Atherly Jones*, for the plaintiff: The rule requiring security for costs to be given by a plaintiff resident out of the jurisdiction is not an inflexible rule. It may be that it applies to all cases in

which the matters in dispute are being litigated for the first time, and in which, consequently, there is no greater presumption in favor of one party than of the other; but it is otherwise where, as in the present case, the matters have already been fought out by the same parties in another court. The plaintiff having already obtained judgment in the French court, there is a presumption that he will equally succeed here. He ought not, therefore, to be ordered to give security. Moreover, as the defendant admits the fact of the judgment, the plaintiff has nothing to prove. The whole onus is on the defendant, who is therefore the real plaintiff.

(He referred to *Ferguson vs. Kootenay Smelting & Trading Syndicate*, 36 Sol. J., 461, and *Re Contract and Agency Corporation*, 57 L. J. (Ch.), 5.

E. F. Spence, for the defendant: There is nothing in the present case to take it out of the general rule. A plaintiff residing out of the jurisdiction is in no better position by reason of his cause of action being founded on a judgment than he would be if he were suing on a simple contract. A foreign judgment is, for the purposes of order III, R. 6, treated as an ordinary contract debt. The mere fact that in the present case the onus is on the defendant is immaterial. It would equally be so in an action on a bill of exchange, but it could not be contended that in such a case the plaintiff, if resident out of the jurisdiction, would not be required to give security. Unless security is given here, the defendant, if successful, will be unable to get any costs, for the judgment in France in the plaintiff's favor would still be outstanding, and the courts there would refuse to recognize its reversal by the English court.

MATHEW, J.: I am of opinion that this appeal must be allowed, and the order of Grantham, J., increasing the security to be given by the plaintiff, reversed. It is obvious that what the defendant desires is to have a retrial of matters that have already been gone into and decided by the French courts, and the suggestion is that he may be able to produce further evidence, in addition to what was before the French courts, and thereby induce this court to arrive at a different conclusion; but the presumption is that the decision of the

French courts was right. Under these circumstances the defendant is not entitled to the security which he asks for.

COLLINS, J.: I am of the same opinion. The argument for the defendant goes the length of affirming that a person who sues here on a judgment recovered in a foreign court stands in no better position than one who sues here upon an obligation which has not been the subject of a judgment; but however low a foreign judgment may be put, it cannot be put as low as that. It may be that such a judgment does not create an estoppel, as was at one time thought to be the case; but at least it is strong *prima facie* evidence in favor of the party who has obtained it if the other side appeared and litigated the matters in dispute. We are not here dealing with a judgment obtained in default of appearance. The matter was fought out in the court of first instance, and again in the court of appeal, and in the course of those inquiries all the points which are now urged for consideration of the English court must have been before the French courts and dealt with by them. Therefore, there being a strong *prima facie* presumption that the defendant will fail in his defense to the action, I do not think he is in a position to insist upon security for costs.—J. F. C.

The defendant appealed.

1894, March 14.—*Lawson Walton, Q. C.*, and *E. F. Spence*, for the defendant: A person instituting legal proceedings in this country and residing abroad is compelled to give security for costs. That is the rule as laid down by Jessel, M. R., *In re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co.*, 2 Ch. D., 531, and the only exceptions to its generality have arisen in cases in which the defendant already had some security, either because he owed the plaintiff money which he could retain (*Re Contract and Agency Corporation*, 57 L. J., ch. 5) or the plaintiff had sufficient property within the jurisdiction which might be taken in execution (*Edinburgh & Leith R'y Co. vs. Dawson*, 7 Dowl., 573). The fraud of the plaintiff before the foreign court would, if proved, be a good defense to this action. (*Abouloff vs. Oppenheimer*, 10 Q. B. D., 295; *Vadala vs. Lawes*, 25 Q. B. D., 310.)

Crump, Q. C. (*W. Geary* with him), for the plaintiff: A foreign judgment stands on a different footing from other claims by foreigners, for it is according to the comity of nations to enforce such judgment.

(He cited *Williams vs. Jones*, 13 M. & W., 628; *The City of Mecca*, 5 P. D., 28; *Goddard vs. Gray*, Law Rep., 6 Q. B., 139.)

LORD ESHER, M. R.: I am of opinion that this appeal must be allowed. In this case we do not know the grounds upon which Grantham, J., came to his decision, but the divisional court has set aside that decision and we have heard their reasons for so doing.

I myself am inclined to think that it was a matter of discretion in the divisional court. I cannot quite make up my mind that, under all or any circumstances, the court is bound to make a foreigner give security for costs if he brings an action in this country. The rule can hardly go that length; but if the matter is discretionary, the discretion, unless there is something very exceptional, is exercised only in one way.

The divisional court exercised their discretion, as I understand their judgment, upon the ground that, in their view, the plea as pleaded showed no defense at all to the action. When we look at the plea, I think that was a mistake and that the plea as pleaded does show a defense, and, if it is proved, shows a good defense. Therefore they have exercised their discretion on a wrong ground, and I think we must reverse the decision of the divisional court and restore that of Grantham, J.

LOPES, L. J.: In the case *In re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co.*, 2 Ch. D., 531, the late master of the rolls, Sir George Jessel, and in the case of *Pray vs. Edie*, 1 T. R., 267, Buller, J., held that the principle is well established that where a person is instituting legal proceedings in this country, being resident abroad, so that no adverse order could be effectually made against him if unsuccessful, he is, by the rules of the court, compelled to give security for costs. Speaking for myself, I certainly have always understood that to be, I may say, the inflexible rule of the court, and I have always understood that no difference existed between an action on a foreign judgment and other actions.

The divisional court reversed the decision of Grantham, J., who ordered that the amount of security should be increased by eighty pounds, and they seem to have reversed it on different grounds. Mathew, J., seems to have thought that the order ought to be reversed and the security left unaltered because there was no substantial defense, or, I might almost say, no defense at all to this action; but we have carefully examined the plea, and now it is admitted and it cannot in point of fact be disputed that if that plea is made out it will be, according to the authorities, a good answer to the action, and I think that must have been the view this court entertained when the appeal came before it under order XIV. On that occasion an application was made under order XIV for final judgment. The master refused it and gave unconditional leave to defend. The judge did the same, the divisional court did the same, and this court affirmed those respective decisions, and I take it we must have held that this plea (it was not in the shape of a plea then, but the effect of the plea was embodied in an affidavit) afforded a good answer to this action if it was made out. I think, therefore, the ground upon which Mathew, J., proceeded was erroneous.

Collins, J., seems to have proceeded on another ground. He seems to have thought that there was a distinction to be drawn between an action brought on a foreign judgment and an ordinary action—for debt, I will say—and he seems to have put it on this ground: that there having been a decision by the foreign court in favor of the plaintiff, there was a strong *prima facie* case in his favor, and that therefore the ordinary rule ought not to apply; but, as I have already said, as far as I understand there is no difference between an action on a foreign judgment and any other action. I think, therefore, the decision of the divisional court was wrong and that the order made in chambers ought to be restored.

DAVEY, L. J.: I am of the same opinion. It was admitted that there is no authority to be found either in the reports or in any text book for the refusal by the court of an order for security for costs by a person resident abroad, suing in these courts, except in the well-known exceptions of either cross-actions or of an action against a defendant who has money of the plaintiff's in his hands, so that he can repay himself if necessary or (it may be) if the plaintiff has sub-

stantial property within the jurisdiction. I should be surprised if there had been any authority, because, in my opinion, it is well established the other way, adopting, as I do, the language which has been quoted from the judgment of the late master of the rolls.

I only desire to add, in regard to the grounds stated by Mathew, J., that in my opinion the court cannot, upon an application for security for costs to be given by a plaintiff, go into the merits of the action. It appears to me that it would be highly inconvenient to do so; and as the reason for giving security for costs is not dependent on the merits of the action, I do not see why the merits of the action should be looked into at all. If the defendant has no defense or if it is a frivolous defense and a mere attempt to try the action over again, there are appropriate means for setting aside and removing from the files of the court a statement of defense which affords no real ground of defense, but which is frivolous and vexatious.

With regard to the grounds stated by Collins, J., I can only say that I am not aware of any authority, nor has any been cited to us, to show that where security for costs is sought from a plaintiff resident abroad there is any difference between an action brought on a foreign judgment and an action brought in respect of any ordinary contract, or for any other cause.

Appeal allowed.

Solicitors for plaintiff, *Nokes & Stammers.*
Solicitors for defendant, *Tatham & Lousada.*

—IN THE—

Supreme Court of the United States.

SAMUEL J. RITCHIE,
Plaintiff in Error,
vs.
JAMES B. McMULLEN
AND
GEORGE W. McMULLEN,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

In 1888 the defendants in error, as plaintiffs, filed a petition against the plaintiff in error in the Circuit Court for the Northern District of Ohio. The defendant answered and the plaintiffs demurred to part of the answer, but before the demurrer was heard filed an amended petition by leave of Court. (Record, page 5.) The defendant answered the amended petition (page 8). The plaintiffs filed a general demurrer to the answer (page 12), and upon hearing, the demurrer was sustained and judgment rendered for the plaintiff.

The opinion of the Court will be found in 41 Federal Reporter, 502.

The sole question presented is whether the answer stated a defence to the action or not. Of course, the original petition and answer are of no importance. The amend-

ed petition stated that one of the plaintiffs was a citizen of Canada and the other was a citizen of Illinois, and that the defendant was a citizen of the Northern District of Ohio; that on the thirteenth day of January, 1886, the plaintiffs, being the owners of certain bonds and coupons of the Central Ontario Railway, agreed to sell the same to the defendant for $210,000.00 of the stock of the Canadian Copper Company, and the defendant agreed to purchase said bonds and pay therefor said amount of stock; that the agreement was broken by the defendant, and thereupon in 1887 the plaintiffs commenced an action in the Queen's Bench Division of the High Court of Justice for Ontario, a court of general jurisdiction in the Dominion of Canada; that service of summons was made upon defendant, who duly entered his appearance.

It was further alleged that the action in Canada was brought upon the agreement above mentioned, and that in their pleadings plaintiff prayed that the agreement might be specifically enforced, or that they might be awarded damages for the breach of the agreement. It was further stated that the defendant answered the claim of plaintiffs denying their statements, and further alleging that the bonds were only formally assigned to defendant in order to make a favorable disposition of them; that if the agreement purported to be an absolute sale it should be reformed; that, in fact, defendant was not to pay plaintiffs any money, except from the proceeds of a sale of the bonds, and that none of the bonds had been sold. The amended petition further stated that issue was joined upon the defendant's answer in the Canadian Court; that upon trial plaintiffs recovered a judgment against the defendant for $238,000.00; that the judgment was still in force, unreversed and unsatisfied in whole or in part, and that by reason of the facts stated in the amended petition, defendant became and was indebted to plaintiffs in the amount above named and interest, for which they prayed judgment.

The answer to the amended petition admitted the citizenship of the parties, and the execution of an agreement which was in substance that set out in the amended petition; that an action was commenced in Canada for the general purpose stated in the amended petition, and that attorneys entered, or undertook to enter, defendant's appearance in said action. Defendant also admits that a formal but an irregular and void judgment was entered up against him in the Canadian Court, but alleges particularly that the contract was entered into for the purposes stated in the original action in Canada; that the plaintiffs never performed, or offered to perform, the contract; that the judgment was entered without any hearing, and in the absence and without the knowledge of the defendant; that no facts existed or were presented to the Court which justified the judgment; that the bonds and coupons were not brought into Court, and that it was not in the power of plaintiffs to deliver them; that the judgment was irregular and without evidence, and "without any jurisdiction or authority upon the part of the Court to enter such a judgment upon the facts and upon the pleadings in said action."

BRIEF.

The answer is not very artificially drawn, but it was intended to state that the defendant had a good and meritorious defense to the original claim; that on account of his absence he did not present the facts constituting his defence to the Court; that the plaintiffs did not make any proof authorizing a judgment in their favor; that the Canadian Court had therefore no right to enter the judgment, and that he should therefore have judgment against the plaintiffs in the Circuit Court. The claim of the plaintiffs, however, was that the judgment of the Canadian Court was conclusive in the absence of fraud, which was not alleged.

The admission of the citizenship of the parties, the commencement of a suit for the purpose named in the amended petition, the appearance of the defendant and the rendition of a formal judgment, was sufficient to entitle the plaintiffs to a like judgment in the Circuit Court of the United States.

The general denial did not reach to anything essential, and evidently was not meant to apply to some of the immaterial averments of the petition which are in form denied. For example, it technically denies that the defendant made answer in the Canadian Court; but the defendant goes on immediately to aver that the contract was entered into "for the purpose stated in his answer in said original action in the Province of Ontario." So there is perhaps a technical denial of the general jurisdiction of the Canadian Court, but clearly the only denial intended is that stated in next to the last paragraph of the answer, i. e., "jurisdiction or authority to enter such judgment upon the facts and the pleadings in said action."

The denial, however, would be unimportant if made, because the averment in the petition was immaterial, as jurisdiction is to be presumed, and none of the old and well approved precedents contain any averment of jurisdiction. Robertson v. Struth, 5 Adol & Ellis, N. S. (22 E. C. L., 941); Gunn v. Peaks, 36 Minn. 177. If it was intended to claim that the Canadian Court was not a court of general jurisdiction, such claim would have to be made by positive averment in the answer to be available.

The allegation in the answer that the Canadian judgment was irregular and void was equally unimportant in view of the admissions made, and the plain intention of the pleader was to say merely that it was irregular and void because of the facts afterwards stated in the answer.

The only question therefore raised by the demurrer, as well as the only question argued in the Circuit Court, was

whether the judgment of the Canadian Court was conclusive in a Court of the United States, in the absence of fraud, or only *prima facie* evidence of the right of the plaintiffs to recover, which might be rebutted by showing that justice required a different judgment upon the merits.

Of course it has long been well settled that a judgment of one state of the Union is as conclusive in any other state as in the state where it was rendered. It may well be admitted that in the discussion which led to the final statement of this rule as a requirement of the Constitution, it was taken for granted that a foreign judgment gave a plaintiff only a *prima facie* right to recover in the United States. Dicta to that effect may therefore be found. (Mills v. Duryee, 3 Cranch 481.) Otherwise the question is new in this Court.

It was never doubted that a plaintiff who had been defeated in his own country could not successfully prosecute a suit against the same defendant in another country. The judgment for the defendant was an absolute bar everywhere. But a different view of the right of a successful plaintiff to avail himself of his judgment in other countries was taken for many years in England, and followed in the United States. It was also early held by the House of Lords that where the matter in issue in the English Court had been tried by a French Court, and the judgment had been carried into execution, it must be treated as *res adjudicata*. It is difficult to account for some of the nice distinctions that have been made against plaintiffs suing on foreign judgments; but a careful review of all the cases will show that they had their origin largely in technical principles of law and rules of pleading. Actions of debt and actions of assumpsit are much discussed. Bank v. Harding, 9 Manning Granger & Scott (67 E. C. L.) 661, largely turned on matters of pleading. The courts have also been very slow in some instances to apply to the proceedings of foreign tribunals the doctrine that the original debt is merged

a foreign judgment was so satisfactory that the case became at once a leading one upon that subject, and was accepted as authority in all subsequent cases.

In 1862 the question was argued before the same court in Scott v. Pilkington, 2 Best & S. (110 E. C. L.) 11. Here the action was upon the judgment of a New York court. It was contended by the defendant that it appeared upon the face of the record that the New York court had decided the case by the law of that state, when it should have been decided by the law of England, and that even if the New York law were applicable, the court was clearly in error, and had done injustice. Cockburn C. J. held that the case was governed by the law of New York, and, that being so, Bank v. Nias had settled the law that there could be no inquiry in England either into the merits or as to the conclusion reached by the court of foreign state, as to its own law.

Vauquelin v. Bohard, 15 Common Bench Reports, N. S. (109 E. C. L.), d. 341, was also decided about the same time, and had reference to a judgment of a French court. In giving his opinion, Erle, C. J., said (367) "I apprehend that every judgment of a foreign court of competent jurisdiction is valid and made the foundation of an action on our courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But until that course has been pursued the judgment remains in full force and capable of being sued upon."

Keating, J., also said: "The judgment of a foreign court may undoubtedly be impeached in our courts for want of jurisdiction, but not by the denial of any facts which it was competent to the foreign court to try, and which that court may have decided on the merits. Now the facts alleged in the thirteenth plea clearly would have been properly triable in the French court. We must assume that

they were tried there; and we cannot retry them here according to the laws and customs of another country."

A still stronger case, if possible, is Goddard v. Gray, L. R. 6 Q. B. 139, decided in 1870. Up to about that time the argument in favor of holding foreign judgments conclusive had been mainly derived from convenience and comity, but it here, as well as in Williams v. Jones, 13, Mees & W. 633, rested upon higher ground and true principle. It appeared upon the face of the record of the proceedings of the French court that it had made a mistake in the construction of an English contract, and on that account a different judgment was given from that which would have been given if the contract had been correctly construed according to English law. It was held, however, that the defendant could not set up a mistake of English law any more than a mistake of the law of a third country; that if the mistake had concerned Scotch law, it would be presumption in an English court to assume that it was better qualified to decide the matter than a French court, as it would be equally improper for a Scotch court to correct a French court in its interpretation of English law, and that the French judgment could not be conclusive in one foreign country and not in another; that there was no difference between a mistake of this kind and a mistake of any other kind, and that the character of the mistake was not changed by the fact that it appeared upon the face of the proceedings. It was then broadly stated as the decision of the court that when a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It was in this way, it was said, not out of politeness or courtesy, that the judgments of foreign colonial courts are supported and enforced. Hannen, J., was not prepared to assent to all that was said, but agreed with his associates in the result, because the defendants submitted

to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision.

It will be observed that even upon the narrow ground of Justice Hannen's opinion, the plaintiffs in this case were entitled to a judgment, as the defendants, according to their own showing, voluntarily submitted to the jurisdiction of the Canadian court.

In 1862, before the latest English cases, the Court of Appeals in New York had pronounced foreign judgments conclusive upon the parties. Lozier v. Westcott, 26 N. Y. 146. This was an action brought upon a judgment of a court of Upper Canada. The opinion is largely based upon the considerations presented by Kent and Story, and quotes with approval the remark of Chancellor Kent, that to retry the issues upon which judgment had been rendered would be carrying the doctrine of re-examination to an oppressive extent. The following quotations are from the opinion in this case:

"Much discussion, and not a little contrariety of decision has obtained in England and in this country as to the conclusiveness of a judgment obtained in a foreign country, when sued upon in the courts of England or of this country. The rule may now be regarded as firmly settled in England, that the judgment is conclusive, so far as to preclude a re-trial upon the merits. It remains competent for the defendant to show that the foreign court had not jurisdiction of the subject matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained. The same rule was early enunciated in this state by Chief Justice Kent in Taylor v. Boyden (8 John, 173). He there says: 'To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a

new trial in every case, and upon every question of fact.'

"The views suggested by Judge Story seem to be eminently correct, and most in harmony with sound principles and the best considered cases. He very truly says that it would be difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the case anew in a suit upon the foreign judgment. He inquires 'In a case of covenant or of debt, or a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be retried? Is the court to open the judgment, and to proceed *ex æquo et bono*? Or is it to administer strict law and stand to the doctrine of local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject.'

"He states that the defendant ought to be permitted to show that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or upon its face it was founded in mistake, or that it is irregular and bad by the local law. Beyond this, he insists, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and compel the plaintiff to establish again those merits and his rights to a recovery."

"At the last term of this court, in the case of Rocco v. Hackett, we held a judgment recovered in Massachusetts, when the court there had acquired by the laws of that state jurisdiction of the party, in a suit upon that judgment in the courts of this state, conclusive upon the parties, and that the merits of the controversy could not be retried here in such action. We think the rule adopted in England, holding the same doctrines as to foreign judgments and

recognized in this state, should be adopted and adhered to here, in respect to such foreign judgments, and that the same principles and decisions which we have made as to judgments from the courts of other states of the Union should be applied to foreign judgments."

The Supreme Court of Illinois was called upon in 1876 to consider the question in the case of Bates v. Palmer, 83 Illinois 568, in the light of all the recent adjudications, and reached a conclusion entirely in harmony with them. The action was brought upon a Canadian judgment. In the course of the opinion it is suggested that there is no valid distinction between a personal judgment and the decision of a court of admiralty, which is conclusive everywhere. So, if an award had been made in one country it could not be impeached in any other country, except for fraud, and the judgment of a court to which the parties have submitted their disputes in accordance with law ought to be equally binding. Any other rule is certainly inconsistent with the declared policy of the law to bring litigation to an end. By comity we give effect to contracts entered into in a foreign country. If we may inquire into the proceedings of a foreign court to see whether justice has been done, why may we not inquire into the justice of the law entering into a contract? To make a judgment only *prima facie* decisive is not acting under the law of comity, but sitting in review. The court also suggests that a curious and very unjust result might easily occur from the adoption of the rule that judgments are but *prima facie* decisive. Thus a judgment might be recovered in France, and the plaintiff suing upon it in England might be defeated, and the defendant would thus have an absolute bar in one country, and be liable in another. But the condition would be still more anomalous if the supposition should be pushed one step farther. If the plaintiff, after being defeated in England, should sue the defendant in the United States, he could not be permitted even to try his case upon the

merits; for, by long approved law, the bar in England would be a bar everywhere.

The current of recent authority is all in one direction, and perhaps nothing gives clearer evidence of it than the notes in the English Common Law Reports. When the case of Bank v. Nias was published, the editor added a note to show that the American law was not in accord with the decision in that case; but when Scott v. Pilkington was published eleven years later, the editor added a still longer note showing that the doctrine of that case was accepted in this country as well, and hailing it as a distinct advance in the process of simplifying the administration of justice.

As has been already mentioned, recent cases are in harmony with the opinions of Story and Kent, as expressed in their text books, and substantially all text writers now echo the same opinion. See an article of Judge Redfield in 4 American Law Register, N. S. 8 (1864;) Herman on Estoppel, Sections 491 and 494 to 498; Van Fleet on Collateral Attack on Judicial Proceedings, Sections 848 and 949; Wharton on Conflict of Laws, Sections 646 and 656; Bigelow on Estoppel, 196 to 205; Freeman on Judgments, 507, in which it is said; "No prediction is more likely to be realized than that our courts will in time place foreign judgments on the same footing which they now occupy in the mother country;" Wells on Res Adjudicata, Sections 510 to 517; the following is from Section 517: "On the whole, then, it may be said that the whole question of the conclusiveness of foreign judgments has been very elaborately examined, and that the civilized world has come to a uniform conclusion, with some immaterial variations: as for instance, France and some other countries proceed on the basis of reciprocity, holding as conclusive the judgments of those states that reciprocate in kind. That uniform conclusion is in favor of the binding force of foreign judgments under certain limitations. We need not pursue the matter here, as there is no distinction worth noting

between foreign judgments and judgments rendered in sister states in our country."

Reference is also made to Castrique v. Imre, 4 H. L. 414; Messina v. Petrocochino, L. R. 4 Privy Council, 150; and to Hilton v. Guyott, 42 Federal Reporter, 249, decided by Judge Wallace, which is notable for its well sustained reasoning and full citation of authorities in favor of the doctrine here maintained.

Judge Story's remarks are especially full and forcible. In connection with the right to retrial he speaks of the injustice which might be done a plaintiff through the death and absence of witnesses, the loss of vouchers, and a partial examination instead of a full examination; and pronounces the treatment of a judgment as *prima facie* decisive as merely a delusion, and equivalent to granting a new trial.

In view, then, of both principle and authority, the Circuit Court was right in sustaining the demurrer to the answer, and its judgment should be affirmed.

SAM'L E. WILLIAMSON,

of Counsel for Defendant in Error.

81

JAMES H. McK

IN THE

Supreme Court of the United States.

SAMUEL J. RITCHIE,
Plaintiff in Error,

vs.

JAMES B. McMULLEN

AND

GEORGE W. McMULLEN,
Defendants in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

By SAM'L E. WILLIAMSON,
of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

SAMUEL J. RITCHIE,
Plaintiff in Error,

vs.

JAMES B. McMULLEN
AND
GEORGE W. McMULLEN,
Defendants in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

As the brief for plaintiff in error was received so late, and after the brief for defendant in error had been filed, it is perhaps proper to add a few words to the brief already submitted.

There is little that has not already been considered, but as a large part of the brief for plaintiff in error is occupied with the consideration of the case of Abouloff v. Oppenheimer, 10 Queen's Bench Division, 265, it calls for a few remarks. It had not occurred to me that that decision could be thought of by anyone as authority in the present case; and it should be said in the first place that the most material fact in the Abouloff case is omitted from the statement as made in the brief of the plaintiff in error. It is there stated that the plaintiff sued the defendant in a Russian court to recover the possession of certain goods,

or the value thereof, and obtained a judgment for such value, and that when suit was brought upon this judgment in an English court, the defence was made that at the time of the Russian suit the plaintiff had the goods in her own possession; and to that defence a demurrer was interposed. Whether this correctly states the defence made or not, will be learned from reading the plea on page 296, which is as follows:

> "And for a separate and distinct defence, the defendants say that if the said judgments, or either of them, were obtained as alleged (which is not admitted,) the same and each of them were *obtained* by the *gross fraud* of the plaintiff and of her husband, Gregor Melcoevitch Abouloff, acting in collusion with her, in *fraudulently representing* to the said District Court of Tiflis and the said High Court of Tiflis that the goods in question were not in the possession of the plaintiff and her husband at the time the said suit (if any, which is not admitted,) was commenced, and at the time the said judgment (if any) was given, and during the whole time the said suit (if any,) was depending, and by *fraudulently concealing from the said Courts* that the whole of the said goods were, as the fact was, and as the *plaintiff* and her husband *well knew*, at the time the said suit (if any) was commenced and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff, and *concealed by the plaintiff* and her said husband, except as to so much of the goods as the plaintiff and her said husband had from time to time *secretly and fraudulently disposed of*."

It will be observed that every act of the plaintiff in connection with the suit in Russia is charged to have been

fraudulent, and that the judgment was obtained by the gross fraud of the plaintiff in the particulars set forth. In this case, on the contrary, there is not an intimation of any fraudulent act upon the part of the plaintiffs in obtaining the judgment, or in the conduct of the litigation. It is difficult to understand how the judgment was entered up without any hearing, in view of the fact that the defendant had an answer on file; but there is no averment that the defendant was prevented from appearing in court to defend his case, or had not full opportunity to present to the court the defence upon which he now insists. It is true that he claimed in his answer that the bonds and coupons were not delivered to him, and that the plaintiffs were unable to deliver them; but there is nothing to indicate that all the facts in reference to that matter were not before the court, or that the court was imposed upon in any respect; and, even if the statements contained in the answer are true, the plaintiffs may have had the very best of reasons for supposing that the bonds had been tendered, and that they were able to deliver them whenever the defendant should pay for them. In all this, the plaintiffs may have been acting upon the most reliable information, without any bad faith whatever. Indeed, the whole defence may have been intended to raise a technical question as to what constituted a delivery under the terms of the contract. The counsel for the plaintiff in error have undertaken to state the contents of the answer on page 50; and the only part of the statement which would have the most remote tendency to indicate fraud, if coupled with proper averments, is the allegation that the plaintiffs had negotiated the bonds and coupons "for loans for their own benefit." *There is no such averment in the answer.* There is such an averment in the answer to the original petition, but not in the answer to the amended petition, the demurrer to which was sustained. It is a sufficient reply, however, to all that is said about the Abouloff case, to say that none of the allegations

in the answer in this case are coupled with any charge of fraud, deceit, imposition or bad faith in any form whatever.

Even if there had been a charge of fraud in the particulars stated in the answer, it would still constitute no defence under the adjudications of this court, because it related to the very matters in issue in the Canadian court. This is fully settled in United States v. Throckmorten, 98 U. S. 61. In this respect, the rulings of the English courts differ widely from those of this court. No distinction is made between foreign judgments and domestic judgments in this matter. In the Abouloff case, Brett, L. J., said: "I can not help thinking that the same doctrine which is now asserted with regard to a foreign judgment would be applicable to an action brought on a judgment obtained in an English court other than the court in which the action is brought." The same question afterwards appeared in Vadalia v. Lawes, 25 Queen's Bench Division, 310, in which it was said that it did not matter whether it was the judgment of an English court or of a foreign court that was under consideration. The decision in United States v. Throckmorton shows how radically the law as declared by this court is opposed to the doctrine announced in these English decisions. In that case Mr. Justice Miller says that "where the unsuccessful party has been prevented from exhibiting fully his case by fraud, or deception practiced upon him by his opponent, as by keeping him away from court; a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side," reasons are furnished for setting aside a judgment; but, on the other hand, it is said "that the doctrine is equally well settled that the court will not

set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

The following extract from Greene v. Greene, 2 Gray 361—a case decided by Chief Justice Shaw—is quoted approvingly as follows: "The maxim that fraud vitiates every proceeding must be taken like other general maxims to apply to cases where proof of fraud is admissible; but where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible. The party is estopped to set up such fraud because the judgment is the highest evidence, and can not be contradicted." The court then adds "We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

"That the mischief of retrying every ca e in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

See also Vance v. Burbank, 101 U. S. 514 and Moffat v. U. S., 112 U. S. 22. The following proposition in Bigelow on Estoppal, page 307, quoted by Judge Wallace in Hilton v. Gill, 42 Federal Reporter 249, fairly states the law upon this subject as now understood in the United States." Indeed, there is no doubt that it may be shown

against a foreign judgment *in personam* that it was obtained by some fraud not involved in the examination of the merits in the case, such as preventing the complaining party from presenting the merits of his case, or imposing upon the jurisdiction of the court, or corruption of the court, or collusion between counsel, or the like. But it would seem to be a sound view of the law that this should be the limit, as appears to be the case in regard to questions of fraud relating to domestic judgments.

Attention should also be called to the fact that there is nothing in the answer in this case which shows any reason for the failure of the defendant to make his defence upon the trial in the Canadian court. He had voluntarily appeared and submitted his dispute to the jurisdiction of the court, and, so far as appears, it was his own fault that he did not present to that court the facts which he now says constitute a defence. It is settled in equity, as well as in law, that a court will not set aside a judgment unless there are some hindrances besides the negligence of the defendant in presenting the defence. U. S. against Throckmorton, 98 U. S. 61; Insurance Company v. Bangs, 103 U. S. 780; Embry v. Palmer, 107 U. S. 3.

In this connection, it is worth while to emphasize somewhat the fact that the defendant voluntarily appeared and filed an answer in the Canadian court. It is true that service was made upon him at his home in the United States; but he was under no obligation to appear in the Canadian court unless he chose; or, at any rate, no judgment obtained against him in a Canadian court on such service would have any effect in this country without his appearance. He, therefore, submitted his dispute voluntarily to the decision of the Canadian court, and is bound by the result.

In addition to the authorities cited in the original brief, reference is also made to Voinet v. Barrett, 55 Law

J. Q. B. D, 39, in which the decision in Godard v. Gray, L. R. 6 Q. B. 139, is approved, and the following is added: "And the stream of authority is to the effect that appearance, unless it be appearance under duress is an election to submit to the jurisdiction from which the process has issued." Rusillon v. Rusillon, L. R. 14, Chancery Division 351, is to the same effect.

Justice Fry refers to the doctrine announced by Parke, J. in Williams v. Jones, that the judgment of a competent jurisdiction over the defendant imposes a duty or obligation upon the defendant to pay the sum for which judgment is given which the courts of this country are bound to enforce. He then asks "What are the circumstances which have been held to impose upon the defendant the duty to obey the decision of a foreign court?" and answers his question thus: "The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared." Other circumstances are also mentioned; but in this case, as in all others, the voluntary appearance of the defendant is treated as creating a duty upon his part to conform to the judgment of the courts.

A word only need be added on the point that the plaintiff in error has been deprived of a jury trial. He has certainly not been deprived of such trial in this case because the suit in Canada was in equity for specific performance. But the constitutional provision only guarantees that "the right of trial by jury shall be preserved." This right never secured to a party a jury in cases of default, or on issues of law. If suit was brought upon a note, an answer of matter not constituting a defence would not confer

a right to call a jury. If an action was brought upon an award in France, it could not be said that the defendant had been deprived of a constitutional privilege because he was not permitted to retry the issues of fact to a jury; and if a foreign judgment is by the common law as conclusive as an award, no right is violated by entering judgment upon it in this country without submitting the issues already determined to a jury. In other words, the proposition of plaintiff in error simply begs the question. If the judgment is conclusive by law, then no jury is required; if, on the contrary, the judgment is of such a nature that there may be a re-trial of the original issues, then a jury may be demanded.

I desire to add also to the authorities cited in my original brief: 8 Upper Canada Q. B. 407, and 23 Upper Canada Q. B. 28 as bearing on the question of reciprocal comity.

Respectfully submitted,

SAMUEL E. WILLIAMSON,

Of Counsel for Defendant in Error.

IN THE

Supreme Court of the Unit[illegible]

Term No., 81.

SAMUEL J. RITCHIE, PLAINTIFF IN ERROR,

vs.

JAMES B. McMULLEN AND GEORGE W. McMULLEN,
DEFENDANTS IN ERROR.

Comes now Samuel J. Ritchie, plaintiff in error in the above-entitled case, and moves the Court that said case be set down for reargument before a full bench of this Court in connection with case No. 223 named below (such argument on the part of plaintiff in error not to consume over one hour of the time of the Court), and, for grounds of said motion, states the following:

1. That the said above-entitled case is one involving in a large measure the same important questions of constitutional and international law as are involved in the case of Henry Hilton, appellant, *vs.* Gustave Bortin Guyot, as official liquidator, *et al.*, respondents, No. 223 on the docket of the present term of this Court, and which last-named case, although fully argued at the present term of this Court, has been by order of the Court set down for reargument before a full bench.

2. That the argument in the above-entitled case, No. 81, was not made before a full bench of this Court, but, on the

contrary, but eight justices of this Court occupied the bench at the time of said argument; and, so far as this fact affects the right of rehearing before a full bench, the same reasons for a reargument apply in this case, No. 81, as are applicable in said case, No. 223.

3. That some important principles bearing upon the issue in said case, No. 81 adverse to the interests of the plaintiff in error have since the former argument thereof been brought to the attention of this Court which had not been by either party or counsel for either party presented to the Court at the time of or in the former argument of this case and which counsel for plaintiff in error, therefore, did not discuss as fully as the same would have been discussed had such important principles been brought to the attention of the Court during the former argument and which counsel for plaintiff in error desire to briefly discuss before a full bench.

Respectfully submitted.

BENJ. BUTTERWORTH,
SAM'L SHELLABARGER,
J. M. WILSON,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

Term No. 81.

SAMUEL J. RITCHIE, PLAINTIFF IN ERROR,

vs.

JAMES B. McMULLEN AND GEORGE W. McMULLEN,
DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR ON MOTION OF PLAINTIFF IN ERROR FOR RE-ARGUMENT.

It may probably be inferred, from the fact that the court of its motion assigned the Hilton case, No. 293, for re-argument, that some serious doubts existed in the minds of some or all of the learned justices as to the proper determination of the *decisive* questions in the case. If the same principles are decisive of both cases, there would appear to be no reason why both should not be re-argued if either is. But it seems proper to suggest that the cases differ so widely that the same principles which may determine one are not involved in the other.

1. In the Hilton case the defendant made distinct allegations of fraud, whereas, in this case, there was no charge of fraud; and, as appears from the opinion of the District judge, concurred in by the Circuit judge, no question as to fraud was raised or considered in the Circuit court.

2. In the Hilton case it was necessary that he should appear in the foreign court to protect his property, while in this case the defendant *voluntarily* appeared and submitted himself to the jurisdiction of the foreign court, and thereby consented to make that court the arbiter of his controversy.

3. In the Hilton case one of the chief grounds of complaint is, that citizens of this country were obliged to submit themselves to a strange system of jurisprudence, whereas the judgment in this case was rendered in a land where the same system of justice is administered.

4. The courts of France, where the Hilton judgment was rendered, are governed by considerations of reciprocity in dealing with foreign judgments, while such considerations play no part in determining the effect of foreign judgments in England and Canada; but if it were otherwise, this court would have the highest reason to treat this judgment as conclusive, because such treatment has been uniformly extended to judgments pronounced in the courts of the United States.

It is impossible to notice the principles mentioned in the third clause of the motion, because they have not been brought to the attention of counsel for defendants in error by brief or otherwise.

Respectfully submitted.

SAML. E. WILLIAMSON,
Of Counsel for Defendants in Error.

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